Alliance OF AUTOMOBILE MANUFACTURERS

March 23, 2001

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NHTSA-01-8677-42

Mr. L. Robert Shelton
Executive Director
National Highway Traffic Safety Administration
400 Seventh Street, S.W.
Room 5220
Washington, DC 20590

Dear Mr. Shelton:

Re.: Standards Enforcement and Defect Investigation; Advanced Notice of Proposed Rulemaking (66 Fed. Reg. 6532; January 22, 2001); Docket No.: NHTSA-2001-8677, Notice 1

The Alliance of Automobile Manufacturers (Alliance), whose members are BMW Group, DaimlerChrysler, Fiat, Ford Motor Company, General Motors, Isuzu, Mazda, Mitsubishi Motors, Nissan, Porsche, Toyota, Volkswagen, and Volvo, submits the following comments in response to the above referenced notice. This notice requests comments on ways that the National Highway Traffic Safety Administration (NHTSA) may implement the "early warning reporting requirements" of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act (P.L. 106-414).

We begin our comments by sketching a context for this rulemaking. We next offer a specific proposal for how an early warning system that would provide NHTSA with potentially useful information in a standardized format, with most of the data provided mostly in spreadsheet form. Finally, we conclude by identifying other important considerations for this rulemaking.

We had three objectives in developing our proposal. First, we sought a program that would identify information that may assist NHTSA to identify trends, so that the Agency could act through its established defects investigation process if the trends indicate a potential safety-related defect. At the same time, we sought a program that would not bury the Agency in massive amounts of data that could mask early warnings of potential problems. Second, we attempted to design a program that could be managed efficiently by the responding manufacturers and that did not create undue administrative burdens for them. To accomplish this objective, our proposal emphasizes the need for clear, objective definitions of the required information and addresses the fact that some of the information will be in foreign countries, recorded in a language other than English, and processed by persons whose native language is not English and who in many cases will neither be able to read or write English. Finally, in recognition of the enormous task facing NHTSA and the responding manufacturers to organize and process these new reports, we sought a program that would focus primarily on those vehicle systems that have historically been the subjects of most recalls and/or systems that are requisite for safe operation. In its notice, NHTSA says that, "...it may be more effective to adopt an incremental approach..." to the implementation of these reporting requirements. 66 Fed. Reg. 6536. The Alliance agrees that such an approach will enable NHTSA and the responding manufacturers to work with the data most likely to yield useful information. While Alliance members believe our reporting proposal is feasible for manufacturers and useful for NHTSA, the reporting format and other system design factors, including content, may be optimized once we have had sufficient experience with it.

The Alliance emphasizes that its proposed early warning system will provide NHTSA with trend data drawn from substantial data sources within the responding companies and will require a significant commitment of resources on the part of the manufacturers that are subject to the new rules. Alliance member companies are willing to make this substantial commitment in order to implement the TREAD Act in a reasonable and balanced fashion. It is important to note, however, that the Alliance proposal is a comprehensive package, and its reasonableness is highly dependent on the interrelationship of such factors as the objective definitions for the information to be reported, the simplicity of the reporting format, the frequency of the reports, the geographic scope of the sources of the data, and the vehicle-based reporting on selected vehicle systems. If the Agency proposes an early warning system that differs materially from the Alliance proposal with respect to any of these factors, the proposal may impose burdens that could exceed the value of the requested information.

A. RULEMAKING CONTEXT

1. Alliance members' goal for the early warning system is the same as NHTSA's and that of our mutual customers.

Motor vehicle safety is a shared responsibility among manufacturers, consumers, and the government. Alliance member companies have demonstrated their commitment to advancing motor vehicle safety through: safety advancements and refinements that are shown through scientific evidence to provide real-world injury and fatality reduction benefits; research to expand the knowledge on injury causation; and other safety stewardship programs. Alliance members' goal for this rulemaking is the same as that of the customers that NHTSA and we serve, that is, ensuring the prompt investigation of potential safety-related defects in motor vehicles.

2. Throughout the Agency's history, which spans more than three decades, motor vehicle manufacturers have acted responsibly to protect the motoring public. Congressional review of the circumstances from which TREAD arose did not find that the National Traffic and Motor Vehicle Safety Act had failed in its purpose.

During the 33-year period from 1966 through 1999, over 7,200 vehicle recalls have been undertaken by manufacturers involving more than 259 million vehicles. Nearly all of these recalls were initiated voluntarily by manufacturers. Historically, four out of every five recalls undertaken are determined necessary without any NHTSA involvement. The fifth recall, again undertaken voluntarily, is in the Agency's parlance, "NHTSA-influenced." In these "NHTSA-influenced" cases, there are frequently legitimate questions regarding whether the issue observed in the field is "safety-related" or whether it represents a defect trend, and these are reconciled in the course of the NHTSA investigation. These statistics demonstrate that the system is working and working well. Most safety-related concerns are being identified and corrected in a timely manner.

Moreover, Congressional review of the circumstances from which TREAD arose did not find that the National Traffic and Motor Vehicle Safety Act (Safety Act) had failed in its purpose. There is not an epidemic of defect-related motor vehicle crashes, injuries, and fatalities presently going undetected.

The Alliance raises these points not for purposes of challenging the need to implement the TREAD Act, but rather to ensure that the public expectations for the early warning system are appropriately moderated by an understanding of the fact that most safety defects are found and addressed promptly by the vehicle manufacturers, and this will continue to be the case after the early warning system is implemented.

3. The TREAD Act's foreign campaign reporting requirements can be a valuable companion to any early warning system.

On September 15, 2000, in a letter to the NHTSA administrator, Alliance members voluntarily committed to report to NHTSA, "...their safety recalls and other safety campaigns that are conducted in a foreign country on a vehicle or component part that is also offered for sale in the United States." Requirements similar to the Alliance commitment were ultimately adopted as Section 3(a) of the TREAD Act. The Alliance understands that reports of foreign recalls are already assisting NHTSA in the exercise of its responsibilities under the Safety Act and that these new requirements are presently producing reports from manufacturers in numbers approximately equivalent to the number of domestic defect information reports being submitted. Some of these reports may, however, be redundant of domestic recalls that were also reported to NHTSA pursuant to 49 CFR Part 573. The Alliance urges NHTSA to clarify that redundant reports of foreign recalls (i.e. campaigns that are also being undertaken in the United States) need not be separately reported to NHTSA. With respect to ***non-redundant*** reports, the Alliance believes that these reports will enable NHTSA to monitor product actions taken outside the United States so that the Agency can determine if there is a need to investigate whether a campaign is warranted in the United States.

B. OVERARCHING CONSIDERATIONS FOR RULEMAKING

1. An effective early warning system is one that will get the appropriate information to NHTSA in an efficient, useful format to complement NHTSA's existing defect investigation processes.

Alliance members and NHTSA share the common goal of prompt identification and investigation of possible safety-related defects and, in cases where a safety defect is identified, the prompt correction of the defect. The Alliance believes this goal can best be accomplished by an early warning system designed to complement the existing defect investigation process. A hastily conceived, overly broad program risks overwhelming the Agency with extraneous information that could mask data trends, while at the same time consuming substantial resources that could otherwise be used in more productive safety efforts. NHTSA could be forever buried in data looking for the proverbial "needle in the haystack" and manufacturers would be compelled by law to make sure that NHTSA remains buried. A more enlightened approach is a system that is structured to give NHTSA with potentially meaningful information in a usable format without diverting Agency or manufacturer resources pursuing less useful sources of data.

2. The requirements ultimately adopted must be objective. NHTSA needs to clearly define all of the terms that are being used for the various types of information being considered as part of any final rule.

The TREAD Act adopts significantly increased civil penalties and newly restructured criminal penalties for reporting violations. Moreover, the new data management obligations on manufacturers will be substantial, and will probably require recoding most existing databases in order to capture and code "TREAD-reportable" information at the time it is received by the manufacturer. For these reasons, it is imperative that the requirements adopted be stated objectively and unambiguously so that (1) the requirements are clearly understood by all who may be subject to them and (2) a reportable event can be easily recognized by the staff person receiving the report or coding the data.

NHTSA needs to clearly define all of the terms that are currently being used casually for the various types of information being considered as part of any final rule. This is essential. The enhanced civil and criminal penalties heighten the need for objectivity and certainty in understanding what is required of manufacturers. In the absence of definitions that create a "bright line" easily understood by all who must provide information required by the new regulation, manufacturers will have to consider the possibility of construing the requirements broadly, submitting to NHTSA ANY information that ANY person might someday in the future allege "should have been" provided.

Moreover, precision and clarity are important so that there is a common understanding among diverse companies with widely different systems and ways of doing business. NHTSA should understand that, even with clear definitions, the Agency will not be able to do a detailed "apples-to-apples" comparison of the

data from different manufacturers because there are numerous differences among the manufacturers in the type and volume of information collected. Finally, clarity and objectivity are also necessary so that the requirements can be consistently translated into foreign languages and so that foreign-based personnel know exactly what must be reported and when it must be reported. Given the heightened penalties in the statute, and the need for consistent administration of the new reporting system, the Agency cannot assume that manufacturers' personnel throughout the world, at least some of whom will not speak or read English, will understand what is meant if a rule uses terms for types of information that are susceptible to multiple meanings. Attachment 1 to these comments contains the Alliance's recommendations for the definitions that should be used to develop the early warning information collection system and adopted as part of the final rule.

3. Most data to be reported under the final early warning requirements should be in a standardized form that is searchable electronically to facilitate analyses by the Agency.

The volume of data to be reported to NHTSA under any final early warning reporting system will be exponentially greater than the amount of "early warning" data the Agency currently receives via its hotline and other programs. To assist the Agency in managing this flow of information, and to ensure that significant leads on potential in-use concerns are identified quickly, most of the early warning data should be submitted in a standardized spreadsheet format that is searchable by electronic means. Submission of copies should not be required at the early warning stage, because the volume of paper would be enormous, and the resources needed to read, process and store the information contained in the hard copies would likely exceed the early warning benefits NHTSA would get from the additional information.

Two exceptions to the standardized format should be reports of foreign recalls and reports of foreign customer communications, both of which require some hard copy submissions. The Alliance recommends that these two categories of reports should be made in a format similar to that specified in Part 573 for domestic safety recall campaigns.

4. The early warning program ultimately adopted should overlay NHTSA's current defect and noncompliance investigation program.

NHTSA has developed an investigation process that has served American consumers well. NHTSA's investigation process has helped to influence well over a thousand voluntary safety recalls since its inception. The fact that thousands of safety recalls have taken place without administrative or judicial litigation is a testament to the success of NHTSA's policy of encouraging voluntary compliance with the law, a policy that yields safety recalls much faster than one dependent on lengthy formal proceedings. NHTSA should, therefore, design the early warning system to supplement its existing processes for identifying potential safety defects earlier than it does today. The early warning system should provide the sort of additional information that may assist the Agency to decide whether or not to open an investigation into a potential safety-related defect and not replace the traditional defect process. This would enable NHTSA to focus its resources on those issues most likely to present a risk to the motoring public and that are most likely to result in a safety recall campaign.

5. The TREAD Act requires NHTSA to specify how the information that it ultimately requires under this rulemaking will be reviewed and utilized to assist in the identification of safety-related defects.

In the Alliance's view, the issue is not whether to provide ***more*** data to NHTSA. The issue is how to provide NHTSA with useful data ***earlier*** in the process and in a usable format, to help NHTSA spot trends earlier. Thus it is imperative that NHTSA rigorously analyze which of the data streams identified in its ANPRM will effectively supplement its existing systems and assist it in deciding whether to open an investigation. In order to avoid information overload, NHTSA should eliminate those categories of possible reports that will not serve this purpose.

It is important to note here that the TREAD Act expanded NHTSA's information gathering powers only to the extent necessary to obtain information that "may assist in the identification of defects related to motor vehicle safety in motor vehicles and motor vehicle equipment in the United States..." In fact, the statute contains a provision requiring NHTSA to "specify in the final rule" establishing the early warning requirements "how such information will be reviewed and utilized to assist in the identification of defects related to motor vehicle safety," and further required NHTSA to identify the systems and processes the Agency will use to review the new information. Section 30166(m)(4)(A)(i) of the Vehicle Safety Act, as added by TREAD. In the ANPRM, NHTSA acknowledged this requirement of the statute, but characterized it as one relating to "internal NHTSA matters and ... not ordinarily required by the Administrative Procedure Act to be adopted pursuant to notice and comment." ANPRM, 66 Fed. Reg. At 6543. The Alliance respectfully disagrees with NHTSA's analysis. The TREAD Act authorized NHTSA to obtain a substantial amount of information from vehicle and equipment manufacturers from domestic and foreign sources, but only to the extent the Agency can make the required showing that the mandated information will "assist in the identification of defects related to motor vehicle safety." This required finding is not related solely to "internal NHTSA matters." To the contrary, the statutory finding is a substantive limitation on NHTSA's new information gathering powers, and therefore one that cannot be made absent notice and an opportunity for public comment on the Agency's tentative conclusions. For this reason, the Alliance submits that NHTSA should explain, as part of its forthcoming Notice of Proposed Rulemaking, how it will review and use any information it proposes to require "to assist in the identification of defects related to motor vehicle safety," and allow public comment on that explanation.

6. The TREAD Act did not change the definition of "manufacturer." Reporting requirements must have a nexus to the United States.

The TREAD Act did not change the Vehicle Safety Act's definition of "manufacturer," which is defined as "a person – (A) manufacturing or assembling motor vehicles or motor vehicle equipment; or (B) importing motor vehicles or motor vehicle equipment for resale." A manufacturer that is located outside the United States and offers a motor vehicle (or item of motor vehicle equipment) for import into the United States is required by § 30164 of the Vehicle Safety Act to designate an agent in the United States to accept service of notices and process from NHTSA on behalf of the foreign manufacturer. If a foreign manufacturer offering a motor vehicle or motor vehicle equipment for import into the United States fails to designate an agent, the statute provides that service on that manufacturer may be effected by posting the notice or process in the Office of the Secretary of Transportation.

In the ANPRM, NHTSA has correctly interpreted the definition of "manufacturer" as extending only to those foreign entities engaged in "manufacturing or assembling motor vehicles" that are "shipped to and sold in" the United States. 66 Fed.Reg. 6532, 6535. In fact, since the entire purpose of the early warning requirements is to "assist in the identification of defects related to motor vehicle safety ... ***in the United States***," (emphasis added), the TREAD Act confirms that the definition of "manufacturer" is correctly interpreted as requiring that the manufacturer have a nexus to the United States before the Safety Act or the TREAD Act would apply to that entity. In Attachment 4, the Alliance provides more extensive comments about the importance of assuring a nexus to the United States in establishing the definition of "manufacturer," and asks for NHTSA's confirmation of the Alliance's understanding of the scope of the reporting obligation.

Based on long-standing and well-recognized international law principles limiting a State's ability to exercise extraterritorial jurisdiction, in particular extraterritorial criminal jurisdiction, the Alliance strongly urges NHTSA to use a "reasonableness" standard in exercising or attempting to exercise jurisdiction over foreign entities. NHTSA should adopt a "reasonableness" standard in its requests for information from foreign entities. Please see Attachment 10 for a memorandum that discusses the international and domestic law principles that should guide NHTSA in deciding the extent to which it should apply TREAD extraterritorially.

C. RECOMMENDATIONS AND PROPOSAL FOR AN EARLY WARNING SYSTEM APPLICABLE TO NEW VEHICLE MANUFACTURERS

1. To avoid structuring an overwhelming, and therefore ineffectual, early warning system, NHTSA should adopt a focused system guided by the experience it has gained.

NHTSA should implement an early warning system by adopting a system focused on those systems that are "safety critical" and which have historically been involved in the largest number of recalls. The Alliance believes that, in addition to tires and child restraints, implementation of an early warning system should initially focus on the following systems: braking systems, fuel systems, restraint systems, and steering systems on all motor vehicles and axle/suspension systems on heavy trucks and trailers. These categories were identified by NHTSA in the ANPRM as a possible starting point for the early warning system, and the Alliance believes that these systems identify the appropriate scope of the early warning system. The scope and content can be reviewed as the Agency gains experience with this system. For purposes of these comments, the Alliance will refer to the "four covered vehicle systems" to mean braking systems, fuel system, restraint systems and steering systems, because those are the ones that would be tracked and reported by Alliance members. The Alliance expects that NHTSA would establish similar requirements for reporting by heavy duty vehicle manufacturers that would include these four systems, plus axle/suspension systems, and requirements for tire and child restraint manufacturers that would include their products. Any reference to "four covered vehicle systems" in these comments is not intended to suggest that these other systems would not be included in the early warning system.

2. Because most defects and other field concerns are highly application specific, early warning reporting to the Agency should be in a vehicle context.

Many defects and other field concerns manifest themselves only under certain conditions stemming from the general operating environment and application. For example, certain high load operating conditions that a pick-up truck experiences may cause the transmission fluid temperature to exceed the melting point of materials used in the connector that joins the fluid line to the transmission. If the same fluid line is also used in a passenger car environment where it never sees the same high load, high temperature operation, no problem may be encountered. Therefore, TREAD reports about original equipment should be made only in the context of the vehicle.

With regard to reporting responsibility, the Alliance believes that manufacturers are in the best position to report to NHTSA issues involving components installed in their vehicles. Specifically, owners are highly unlikely to report any complaints to component suppliers. Instead, vehicle owners experiencing problems with vehicle components will turn to their dealers. As a result, component manufacturers will only be notified after the vehicle manufacturer is made aware of the issue. Placing responsibility on vehicle manufacturers to report information pertaining to vehicle components is therefore the most efficient and earliest means to alert NHTSA to potential early warning issues. An exception to this is tires in those instances in which the vehicle manufacturer does not warrant the original equipment tire. Designing an early warning system in this way minimizes problems of double counting and inaccurate identification that would necessarily occur if both original equipment suppliers and vehicle manufacturers report the same incidents directly to the Agency.

The Alliance recommends that reports from equipment manufacturers be limited to reports involving replacement or aftermarket equipment only. Establishing reporting requirements for early warning information on replacement and aftermarket equipment will satisfy the requirement of the TREAD Act that the early warning system include manufacturers of motor vehicle equipment without incurring the serious risk of double-counting identical incidents that would occur if equipment manufacturers also reported incidents involving components installed as original equipment on a motor vehicle.

3. NHTSA should define for the purposes of an early warning system what is a "covered vehicle."

To ensure that the requirements ultimately adopted are objective, NHTSA should define for the purposes of an early warning system, what is a "covered vehicle." Vehicles certified as being in compliance with federal motor vehicle safety standards (FMVSS) that are offered for sale in the United States would obviously be "covered vehicles." Likewise, vehicles that are sold outside the United States and are "substantially similar" to vehicles certified as being in compliance with FMVSS requirements should also be classified as "covered vehicles."

4. NHTSA should develop a process and guidelines for identifying "substantially similar" vehicles.

To further ensure that the requirements adopted are objective, NHTSA should develop a process and guidelines for identifying "substantially similar" vehicles for the purposes of the early warning system. In the ANPRM, NHTSA noted that the concept of "substantially similar" motor vehicles already exists and is used as one basis for evaluating whether a foreign vehicle is eligible for importation into the United States, (the "gray market" program. The Alliance believes that the "gray market" program provides a useful starting point for developing a process of identifying "substantially similar" vehicles. Under the "gray market" process, NHTSA develops and publishes a list of vehicles that have been determined to be "substantially similar" to United States certified vehicles. The Alliance believes that a similar process would be appropriate here. The details of the Alliance proposal are contained in Attachment 5-10.

The Alliance does not support any requirement to track and report on incidents in foreign countries involving components that are identical or substantially similar to those used on vehicles in the United States but are installed on vehicles that have ***no*** United States counterpart. If a manufacturer uses a braking system on one model in the United States that is substantially similar to the braking system used on a foreign vehicle that is ***not*** substantially similar to the United States model, the Alliance opposes any requirement to track incidents involving that braking system on the foreign model. The Alliance member data systems are not set up to track and collect data in foreign countries on the basis of the similarity of the components to those used in the United States. While it will difficult enough to collect reportable data from other countries involving substantially similar ***vehicles***, the Alliance members believe that such a system is workable only if there is a definitive list of substantially similar vehicles established for each model year. It is not feasible, however, to implement such a system at the component level, particularly in foreign countries.

Moreover, information regarding substantially similar or even identical components in different vehicles would be of very little value to NHTSA. Specifically, vehicle components are designed to interact with each other and do so in different ways from vehicle to vehicle. For example, as provided above, certain high load operation conditions that a pick-up truck experiences may cause the transmission fluid temperature to exceed the melting point of materials used in the connector that connects the fluid line to the transmission. The same fluid may never experience such a problem when used in a passenger car that never generates the same high load, high temperature operation as the truck. When NHTSA takes into account that these types of differences may occur in the over the tens of thousands of parts and components in a vehicle when compared to different vehicles, both the burden of tracking and the lack of value from this information makes apparent the lack of need to track substantially similar or even identical components between differing vehicles. Valuable safety related information will be captured in any event through the reporting of information related to identical and substantially similar vehicles. Because such information is already captured and because of the lack of additional benefit in the face of the overwhelming burden to manufactures to collect component information on differing vehicles, the Alliance does not support the tracking of such components. Instead, NHTSA should limit such tracking and reporting to identical and substantially similar vehicles as outlined in greater detail in this comment.

5. Apart from reporting of foreign recalls and other safety campaigns, the identification of field reports and dealer reports can be a useful element to any early warning reporting system. To facilitate implementation of this requirement, NHTSA should define an international reporting region for the purposes of reporting field reports and dealer reports.

The Alliance believes that field reports and dealer reports can be potentially useful for early warning purposes. Thus, identification of these reports is appropriately included in an early warning reporting system. To be useful as an early warning of possible safety defects, however, a field report or dealer report must be a ***technical*** report and not merely a report of an unverified consumer complaint. Moreover, to be useful, the field report or dealer report should address a possible malfunction in the vehicle system at issue and should not include research reports or accident reconstruction reports prepared for local police departments. Beyond these universal points, however, Alliance member companies differ in their systems for obtaining technical information from the field. Some companies rely very little on technical reports generated by their dealers, preferring instead to have field incidents reviewed by a company technical representative. Other companies receive large quantities of reports from their dealers containing some technical information about field incidents. While many of these dealer reports are not detailed enough to be useful as an early warning, some are.

While the Alliance proposal includes both types of reports, the Alliance proposes adopting separate definitions of "field report" and "dealer report." (See text of proposed definitions in Attachment 1.) A separate definition allow the distinction to be drawn between a report generated by a manufacturer's technical employee, who will usually be knowledgeable about the vehicle system at issue, and a dealer's technical employee, who may have less information about the design and manufacturing history of the vehicle system. Also separate definitions allow NHTSA to specify, with respect to dealer reports, that they do not include the reports that merely transmit an unverified customer complaint without any technical analysis. Because different companies make different uses of "field reports" and "dealer reports," NHTSA can not expect to compare one company's "field report" experience with another company's, especially if the second company is one that collects more data from "dealer reports" than the first company.

Because of the volume of field reports and dealer reports, and the difficulty of translating them from foreign languages, the Alliance proposes that manufacturers should not provide NHTSA with copies of the reports themselves, but instead provide NHTSA with a combined count of all field reports and dealer reports received by the manufacturer in a reporting quarter that involve one of the 4 covered systems incorporated into a covered vehicle in the territorial US or an international reporting region established for tracking field reports and dealer reports. Please see Attachment 5-11 for a description of the international reporting region.

6. Warranty claims taken in isolation are not a good early warning indicator. However, they can be useful in helping to place a dimension on potential concerns identified by field reports and thus warranty claims generated in the United States and in excess of an established threshold should be part of an early warning system.

Warranty claims tracking systems are a business tool used by manufacturers to provide reimbursement to dealers for repairs made to vehicles pursuant to an express warranty. No effort is made at the time of payment to the dealer to determine whether a claim submitted was technically accurate or whether a repair was necessary or appropriate. For these reasons, warranty claims taken in isolation would be a poor early warning indicator of potential safety defects. However, the reporting of some warranty claim information in tandem with reporting the number of field reports on the same vehicle system could help the Agency form a judgment as to whether the warranty data trends track with the number of field reports. The Alliance believes that warranty claim counts could be included in an early warning system for this purpose and that, if included, they could be reported once a predetermined threshold has been exceeded.

This proposal involves enormous new data costs and burdens on manufacturers, who must reconfigure their warranty databases to be able to account for these new requirements. In addition, some mechanism must be made to account for the double counting of dealer inputs counted as field reports and dealer claims counted as warranty data. The same dealer input will likely show up in both systems, thus detracting from the utility of the warranty data as a confirmation of field report data.

One significant advantage of the Alliance proposal is that it avoids the need for the Agency to develop standardized warranty codes. Under the Alliance proposal, manufacturers can keep their existing warranty codes, which were developed by each company to serve its own unique business needs. By aggregating the relevant data from their warranty systems into the four covered vehicle system categories, manufacturers can provide NHTSA with responsive data in a useful format that will not require them to engage in expensive and disruptive revamping of their warranty databases.

The report should be made on the standardized form, which will identify the make, model year, system involved and number of warranty claims received. Because of the immense volume of data, raw warranty claims should not be submitted as part of the early warning system. Moreover, the warranty claims subject to the early warning system should be limited to those generated in the territorial United States, because the Magnuson-Moss Act in the United States has created certain warranty expectations by consumers that are not shared by consumers in other countries.

The suggestions above for submitting warranty information recognizes that there will be substantial burdens on manufacturers if reporting requirements are not specifically defined and well-focused. Companies do not necessarily have worldwide, integrated systems, and requirements that go beyond those suggested above could have a major impact and pose significant compliance challenges.

7. The TREAD Act requires manufacturers to report all incidents and claims received by manufacturers involving allegations of serious injury or fatality. To facilitate the implementation of this requirement, NHTSA needs to establish a simple definition of "serious injury" or an appropriate surrogate.

Each year in the United States alone, there are roughly 6.3 million police reported crashes – 2.7 million of which require vehicles to be towed from the scene. These crashes produce some 42,000 fatal injuries and 3,200,000 non-fatal injuries a year. The Alliance has not been able to quantify how many of these crashes generate claims or other communications between manufacturers and vehicle owners or their representatives. Moreover, it is unclear as to the specificity to which injury allegations are made. The Alliance understands that of the 3.2 million non-fatal injuries occurring each year, roughly 800,000 of these are of a severity of AIS 2 or greater and that 115,000 are of a severity of AIS 3 or greater. This pointedly illustrates the need to develop a definition of "serious injury" easily understood by laypersons or an appropriate surrogate, an injury requiring admission to hospital for some specified minimum length of time, to facilitate implementation in an objective manner. As injury claims frequently are vague, NHTSA should understand that some manufacturers may simply opt to report all claims alleging injury regardless of severity.

The determination as to whether an injury is "serious" for purposes of reporting under TREAD should be made on the basis of the allegations contained in the complaint, claim or other document that is received by the manufacturer at the beginning of the lawsuit or claims process. The Alliance would oppose any requirement to reassess the seriousness of the injury after additional information is received through discovery or otherwise and update the early warning system based on the new information. The Alliance believes that such a constant tracking obligation would be extremely burdensome and difficult to administer, because the personnel involved in defending litigation are unlikely to be the same as the personnel responsible for TREAD reporting. At the same time, such a burdensome requirement would produce very little benefit for the early warning system because data developed in litigation discovery is received too late to be helpful as an "early warning."

The ANPRM asked whether a claim involving a serious injury should be assumed to include "an implicit allegation that a safety defect contributed to the occupant's injury?" The answer is no. The TREAD Act requires reporting serious injury (and fatality) claims only where those claims involve "serious injuries which are alleged or proven to have been caused by a possible defect." The TREAD Act also explicitly precludes a rule requiring submission of information not in the possession of the manufacturer. If the injury claim itself does not allege that the injury was caused by a defect, then it is not a reportable injury under the TREAD Act. Imputing an assumption that the injury was caused by a defect will seriously contaminate the data. For example, if the allegation is simply that a person was seriously injured in a collision, there is no way to tell whether the claimant believes that there is an unspecified defect in a vehicle system, or whether the claimant believes in general that the vehicle should have been more crashworthy. In fact, any rule that imputes implicit allegations into claims that are silent as to specific allegations of defect would have the effect of requiring all serious injuries to be reported, a result that will mask the injuries alleged to have been caused by a defect and read out of the statute a limitation Congress chose to include.

8. The TREAD Act requires manufacturers to report aggregate statistical information about property damage claims received. To facilitate implementation, claims exceeding a pre-determined threshold should be reported.

Of the roughly 6.3 million police-reported traffic crashes occurring in the United States each year, roughly 4.2 million of these involve only property damage. The number of property damage claims received outside the United States is unknown, but is expected to be substantial. Since the number of property damage claims generated in the United States is a large enough universe to illustrate any trends that may show up in property damage claim data, there is little or no added benefit to tracking property damage claims on substantially similar motor vehicles in other countries. Therefore, the Alliance supports limiting the reportable property damage claims to those generated in the United States. The Alliance also supports structuring the reporting system to capture the number of claims for property damage that results from a crash, tire failure or fire, in order to screen out the claims less likely to provide early warning of a defect, such as a claim seeking reimbursement for a rental car used while crash damage on a vehicle was being repaired. (The latter example illustrates why NHTSA's general description of a "claim" as a "communication requesting restitution for an injury or property damage" is too broad to be workable for TREAD reporting purposes.) Third, the Alliance proposes reporting the number of property damage claims in the United States involving one of the four covered vehicle systems, in order to be parallel with the reporting of warranty claims. (Please see the definition in Attachment 1) Finally, the Alliance supports establishing reporting thresholds for property damage claims similar to those established for reporting the number of warranty claims. Establishing reporting thresholds and limiting the reports to the count of responsive claims satisfies the Congressional direction to collect "aggregate statistical data" on property damage claims.

It is not clear to Alliance members the extent to which the reporting of property damage claims will actually assist the Agency in deciding whether to open an investigation into a potential field problem that is likely to result in a recall. Like warranty claims, property damage claims are unlikely to be a good early warning indicator. However, TREAD requires the reporting of at least some information about property damage claims. One appropriate use for information about property damage claims may be to help place a dimension on the extent of a potential in-use concern identified in field reports or dealer reports particularly after a vehicle's warranty has expired.

9. Property damage claims and claims involving "serious injuries" and fatalities would include claims made in the form of lawsuits; however, lawsuits are rarely an *early* warning indicator.

With respect to lawsuits, the Alliance believes that some of the property damage claims and claims involving serious injuries and fatalities would also be the subject of lawsuits, and these would, of course, be included in the counts of such claims in the early warning reporting system. The Agency should recognize, however, that the onset of a product liability lawsuit against a given motor vehicle normally lags significantly the date of manufacture of the vehicle involved – generally on average 5 years or more. Many lawsuits are

purposefully not filed until the eve of the running of the applicable statute of limitations, which could be for years more. Moreover, a plaintiff's theory of "defect" is often not disclosed at the beginning of the litigation, and even when it is disclosed, often changes numerous times throughout the course of litigation, lengthening even more the time between the vehicle's manufacture and the time at which the alleged "defect" is identified with any precision. Lawsuits, therefore, are particularly unsuitable for assisting in the early detection and correction of potential safety related concerns. Therefore, the Alliance believes that there is no benefit to providing information derived from lawsuits, other than the fact of the claim, as part of the early warning reporting system. Of course, as with any defect investigation, NHTSA can seek additional information derived from lawsuits as part of a specific defect investigation, if appropriate.

10. The TREAD Act requires the reporting of customer satisfaction campaigns, consumer advisories, recalls or other activity involving the repair or replacement of motor vehicles or items of motor vehicle equipment. This information should be reported to the Agency in a format similar to that specified in Part 573.

The Alliance believes that this provision of the TREAD Act was included to ensure that NHTSA was informed of customer satisfaction campaigns and similar customer communications involving the repair or replacement of motor vehicles that take place outside of the United States involving vehicles (or equipment) that is substantially similar to products sold in the United States. The Alliance also believes that this provision of TREAD was included to ensure that manufacturers of replacement and aftermarket equipment (including tires) would also notify NHTSA of customer satisfaction campaigns and similar activities outside the United States. The Alliance proposes that information about these foreign customer communications should be provided to NHTSA in a format similar to that specified in Part 573 for safety defect information reports, and should be reported monthly to conform with the reporting frequency specified in Section 573.8.

The Alliance believes that this format and frequency of reporting will provide NHTSA with enough information to know if it should open a service query to obtain more information about the foreign campaign. It should not be necessary to require manufacturers to obtain and translate the actual foreign customer communication documents, because the significant burden of such a requirement is not outweighed by the very limited value added to the ability of NHTSA to identify issues warranting further investigation. Particularly because this provision requires compliance on a global basis, the burden of translating documents from sometimes-obscure languages would be significant.

The ANPRM also stated that NHTSA tentatively plans to require the submission of information regarding the "facts and analysis that led to the manufacturer's decision to issue the communication." The Alliance believes that a short description of the defect (or other issue) that would be contained in a Part 573-style report should be sufficient to alert NHTSA to any issue warranting further investigation, which is the purpose of an "early warning" system. The Alliance would oppose any proposal to require the automatic creation of documents containing in-depth analyses of why a manufacturer decided to conduct a customer satisfaction campaign or issue a customer communications. Such a burdensome requirement goes beyond the purpose of the TREAD Act.

The Alliance opposes providing copies of technical service bulletins and other dealer communications that are issued to dealers in countries outside the United States. Such a requirement would impose a substantial translation burden on manufacturers. If a technical service bulletin or dealer communication issued outside the United States is relevant to "substantially similar" vehicles sold in the United States, a counterpart service bulletin or dealer communication would be issued in the United States and provided to NHTSA under Section 573.8.

11. Fires and Rollovers occurring in the United States and known to the manufacturer should be reported to NHTSA under an early warning system. Fuel leaks that are alleged to have been caused by a defect will be included in warranty claims or property damage claims about fuel systems, or in field reports or dealer reports about fuel systems, and therefore should not be reported separately in the early warning system.

The number of claims involving fires and rollovers occurring in the United States should be reported to NHTSA under an early warning system. NHTSA should note, however, that these reports are likely to be redundant of incidents reported in other categories such as field reports or serious injury claims. The Alliance proposes to define a "reportable rollover" to mean a report received by a manufacturer that (1) involves an event in which a motor vehicle overturns and (2) contains an allegation that the rollover was caused, at least in part, by an alleged defect. The Alliance further proposes to define the term "reportable fire" to mean a report received by a manufacturer that (1) alleges property damage of a motor vehicle resulting from exposure to flame, and (2) alleges that the flame was caused in part by a defect.

The Alliance does not support separate reporting of claims involving fuel leaks. Each warranty claim and claim for property damage alleging that a fuel leak was caused by a defect will already be reported as a claim involving the fuel system, or will be included in the category of field reports involving the fuel system, so a separate report of fuel leak complaints is likely to be redundant of those categories. Further, customers often report fuel odors, when, in fact, no fuel leak is present (such as a fuel odor during refueling). As noted below, consumer complaint information does not lend itself to being part of an early warning information collection system because of the burdens of retrieval. Consequently, the Alliance does not believe that fuel leak allegations should be reported separately from field reports or claims involving the fuel system.

12. Internal investigations should not be reported in an "early warning system" because it is impossible to develop an objective definition of "internal investigation" that is reasonable for all manufacturers covered by the TREAD Act and that would meaningfully assist in the early detection of defects.

The Alliance has been unable to develop a definition of "internal investigation" that is suitable for an industry-wide early warning reporting system. Because so many routine business practices could be perceived as "internal investigations", reporting all of these activities would not be useful as an early warning system. For example, the activity of reviewing and analyzing field performance information (such as field reports) on a regular basis is an "internal investigation" that occurs routinely at most companies. This sort of activity could not reasonably be captured and reported in an early warning system.

In any event, the information reviewed by manufacturers in evaluating product performance is largely the same data that the Alliance recommends be incorporated in the TREAD early warning system and reported as trend data to the Agency, such as field reports, and, for some manufacturers, dealer reports. Even if it were possible to objectively define "internal investigation," the simple fact that a manufacturer would have initiated one would not assist the Agency in identifying potential safety-related defects faster than it could by following up on the trend data it will already be receiving.

13. The number of design changes generated in a year likely exceeds hundreds of thousands. The vast majority of these have no safety implications. As such, these should not be a part of any early warning system.

The number of design changes generated in a year by just three Alliance members exceeds 500,000. These changes are recorded in drawings and other documentation that is inherently unique in format and content and cannot be standardized or reported in spreadsheet, electronically searchable form. Moreover, the vast majority of the changes made have no relationship to motor vehicle safety. NHTSA's notice observes that motor vehicles have some 14,000 parts and components. With roughly 300 carlines sold in the US alone, there would be over 4,000,000 changes reported to NHTSA per year if each component had only one change

in that year. And, changes are typically documented on oversize blueprint form, which is expensive to copy and bulky to store. Finally, design changes may be documented in a language other than English, which would be burdensome to translate. As this information is unlikely to assist the Agency in identifying possible defect trends sooner, this information should not be part of the early warning system. Of course, NHTSA can obtain information on a design change as part of any specific defect investigation, where the change is pertinent to a specific component in a specific make/model can be retrieved.

In this section of the ANPRM, NHTSA also suggested the possibility of requiring manufacturers to provide NHTSA with a dealer password so that the Agency can access internal websites of manufacturers. This suggestion reflects a misunderstanding of information available to dealers on the manufacturers' websites. Design change documentation is not ordinarily available to dealers through the manufacturers' website, except when communicated to dealers through a service bulletin which is already sent to the Agency under Section 573.8. In general, service parts changes are communicated to dealers in parts catalogues, which are available to the public and the Agency. Moreover, design change documentation is ordinarily considered confidential business information, which NHTSA has recognized by granting categorical protection from disclosure under Part 512 (Appendix B, Category 1). Even if design change documentation were available through a secure website, providing NHTSA with a password for accessing that website would enable the Agency to download confidential business information without the manufacturer's knowledge. This would result in NHTSA's access to confidential business information without enabling the manufacturer to assert pursuant to Part 512 that the information is confidential. The Alliance thus opposes providing the Agency with website access to confidential information.

14. Allegations about remedy failures are inappropriate for inclusion in an early warning system program, because by definition they involve defects that are already known to NHTSA.

The Alliance believes that reports of remedy failures are inappropriate for inclusion in the TREAD early warning system, because they necessarily involve defects that are already known to NHTSA. While remedy failures may be an indication that a particular recall remedy was inadequate, they do not assist in the identification of ***new*** safety related defects, and are therefore outside the scope of the information authorized to be collected under TREAD.

15. Consumer complaints contain little useful technical data and their submission is likely to overwhelm NHTSA. As these complaints are unlikely to be a good early warning indicator, they should not be included in any early warning system. They remain reachable by NHTSA under its long-standing investigative process.

The Alliance estimates that over 5,000,000 customer contacts annually might be reportable if required by an early warning requirement. Manufacturer customer call centers and similar systems have been established to assist current and prospective customers with requests for information, parts availability, locating a franchised dealer in a new area, resolution of customer complaints, etc. These systems have not been established to provide primary feedback to a manufacturer's technical community regarding the in-use performance of its product. A considerable amount of review and analysis of the contacts made would be necessary to identify the few customer concerns that may ultimately blossom into a significant safety-related concern. Further, manufacturers do not maintain one, centralized customer contacts database, but rather numerous systems are used through the world in many different languages. Given the potentially massive volume of information containing little to no useful information that would assist the Agency in identifying potential safety-related concerns earlier, consumer complaints should not be a part of any early warning system established. This information can continue to be obtained by NHTSA during the course of any defect investigation.

D. OTHER RULEMAKING CONSIDERATIONS

1. The TREAD Act requires manufacturers to provide information and data required to be submitted to NHTSA that is in the actual possession of the manufacturer.

Under the TREAD Act NHTSA cannot compel the maintenance or production of information that is not in the possession of the manufacturer. §30166(m)(4)(B) of the Vehicle Safety Act as added by TREAD. The Alliance understands that this provision was included to ensure that manufacturers could not be compelled to expend the effort to collect or create information it does not otherwise have in their possession. Put another way, Congress wanted each manufacturer to share with NHTSA certain "early warning" indicators that are known to, and in the possession of, the manufacturer, but not to require the manufacturer to solicit or create information for TREAD purposes that it would not otherwise have in the ordinary course of business.

In the ANPRM, NHTSA seems to agree with this understanding of § 30166(m)(4)(B) when it interpreted this section as "prohibiting [NHTSA] from imposing a requirement that a manufacturer collect data that it does not possess." 66 Fed.Reg. at 6543.

For this reason, the Alliance strongly disagrees with NHTSA's proposal to consider information to be "in the possession of a manufacturer" if it is information in "foreign countries, or information possessed by outside counsel or consultants to the company." 66 Fed. Reg. At 6543.

Establishing a presumption of "constructive possession" of data between corporations is unreasonable, but in any event is foreclosed by TREAD's restriction limiting the reporting requirements to information that is in the ***actual*** possession of the reporting manufacturer. See Attachment 4 for more detail about the Alliance's concerns.

2. The proposal to impute to a manufacturer all information in the possession of its outside counsel or outside contractors is also foreclosed by TREAD and ordinary principles of Agency law.

Neither the Safety Act nor the TREAD Act contains any authority to impose vicarious liability on a manufacturer for failing to report information it did not possess, but which its contractor or counsel possesses. If, however, NHTSA is simply concerned that a manufacturer may attempt to transfer information it has received to outside counsel or a contractor and then claim it does not have actual possession of the information, the Alliance agrees that this would be inappropriate. However, there is no need to address this issue through the broad and hard-to-define legal fiction of "constructive possession"; NHTSA's record retention rules currently require manufacturers to maintain the type of records to be covered by an early warning rule, and manufacturers cannot lawfully discard them.

3. The TREAD Act does not authorize NHTSA to compel the creation of documents analyzing the early warning data.

The ANPRM asserts that "the early warning provisions contemplate that manufacturers must do more than merely provide raw information and data." ANPRM at 6542. The ANPRM cites the TREAD provision requiring the reporting of "information which is received by the manufacturer derived from foreign and domestic sources..." The ANPRM then discusses one (but not the principal) meaning of the word "derive" found in the Random House dictionary, and relies on that definition to support a conclusion that TREAD authorizes "a rule that requires a manufacturer to process, organize, and to some degree analyze the raw data and information it has, so that meaningful information is provided."

The Alliance agrees that TREAD authorizes NHTSA to establish a standardized, electronically searchable reporting format for the data, and strongly encourages the Agency to do so. The Alliance believes, however, that the authority to establish a standardized, electronically searchable reporting format is found in Section 30166 (m)(4)(D), which requires the Secretary to balance the burden of any reporting requirements against

the "Secretary's ability to use the information sought in a meaningful manner to assist in the identification of defects related to motor vehicle safety." Since submission of hard copies of most of the reportable information would be extremely burdensome, as well as less useful to the Agency than a standardized, electronically searchable report, Subsection (m)(4)(D) provides ample authority to the Agency to specify such a standardized reporting format.

On the other hand, the Alliance respectfully disagrees that the TREAD Act authorizes the Agency to require a manufacturer to prepare substantive reports or in-depth analyses of the data. While Alliance member companies recognize their obligation to act upon information that reasonably suggests the presence of a safety-related defect, nothing in the Safety Act or TREAD requires a manufacturer to prepare written "analyses" of the meaning of any of the raw data that will form the basis of TREAD reports, or the reasons for certain data trends. The fact that NHTSA may obtain information "derived" from foreign and domestic sources does not overcome the other provision in the same phrase of the statute that information is reportable to NHTSA only if it is "received" by the manufacturer. A manufacturer "receives" information from third parties, such as consumers or dealers. Likewise, the separate provision of TREAD precluding NHTSA from requiring a manufacturer to "maintain or submit records respecting information not in the possession of the manufacturer" confirms that Congress expected manufacturers to share certain data they possess, but not to require manufacturers to create or obtain documents that are not otherwise in the possession of the manufacturer.

4. Because the early warning reporting system will be comprised of unproven allegations of defects, it would be unfair to place the early warning reports in the docket or on the NHTSA website.

The ANPRM stated that, historically, requests by the public for information submitted to the Agency are addressed under the Freedom of Information Act. The Alliance supports this approach for the TREAD early warning reports. The Alliance does not support any automatic release of the early warning reports in the docket or the NHTSA website, because these reports will contain information that is unproven and that could unfairly impugn the reputation of a product or a manufacturer. While the Alliance recognizes that information submitted under TREAD remains subject to disclosure under the Freedom of Information Act, if a properly drafted request is filed and the information sought is not otherwise confidential under FOIA standards, the Alliance also believes that the provision of TREAD addressing disclosure, Section 30166(m)(4)(C), was included to ensure that the disclosure of non-confidential information in the early warning reports would be made only pursuant to a proper FOIA request, and would not be disclosed pursuant to any presumption of disclosure that is greater than that contained in FOIA.

5. The final rule resulting from this rulemaking is likely to be a "significant regulatory action" as defined by Executive Order 12866.

The TREAD Act directs NHTSA to pursue rulemaking requiring motor vehicle and equipment manufacturers to report information and data, whether originating in the United States or a foreign country, that may assist in identifying defects related to motor vehicle safety in vehicles or equipment in the United States. The ANPRM lists eleven different categories of information and data that NHTSA believes are relevant to this purpose. The data and information likely to be required under a proposed early warning system will likely be drawn from a substantial number of data sources within the responding companies and will require a significant commitment of resources on the part of the manufacturers that are subject to the new rules. New operating processes will need to be developed and computer programs developed to flag, store, and "mine" the information and data required to be submitted. Additional staffing to coordinate data inputs, oversee the preparation of the required reports, and to coordinate related activities worldwide is likely. The Alliance believes that the final rule resulting from this rulemaking will be significant both in terms of its annual effect on the economy and because it is likely to raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. NHTSA should expect that this rulemaking would be "significant" and plan all rulemaking activities accordingly.

CONCLUSION

The Alliance has developed a proposal for an early warning information collection system that may assist NHTSA to identify data trends, so that the Agency could act through it established defects investigation process if the trends indicate a potential safety-related defect. The linchpin of the Alliance proposal involves providing NHTSA with a count of all field reports received by a manufacturer in a reporting quarter that involve one of four covered safety systems, plus tires, incorporated into a covered vehicle sold or leased in the territorial United States or in an international reporting region that the Alliance recommends be established for tracking field reports. To help NHTSA form a judgment as to whether warranty data trends track with any potential concern identified by the number of field reports received, the Alliance proposal also includes the reporting of some warranty claim information exceeding predetermined thresholds established for each of the covered safety systems. Further the Alliance proposes reporting the number of some property damage claims exceeding predetermined thresholds involving any of the covered safety systems, in order to parallel with the reporting of warranty claims. The Alliance proposal has also been structured to capture the number of property damage claims that result from a crash (including rollovers), tire failure or fire, in order to screen out the claims less likely to provide early warning of a defect. The Alliance proposal also includes reporting of serious injuries and fatalities. We believe that establishing reporting thresholds and limiting the reports to the count of responsive claims satisfies the Congressional direction to collect "aggregate statistical data" on property damage claims. With respect to lawsuits, the Alliance proposal anticipates that some property damage claims and claims involving serious injuries and fatalities would also be the subject of lawsuits, and these would be included in the counts of such claims in our early warning reporting system. To further develop our proposal we include definitions for all key terms needed for implementation and we provide prototypes of the recommended reports.

Sincerely yours,
Alliance of Automobile Manufacturers, Inc.

Robert S. Strassburger
Vice President
Vehicle Safety and Harmonization

cc: Kenneth N. Weinstein
Associate Administrator for Safety Assurance

Docket Management, Room PL-401

Braking System means (a) a vehicle's service brake or any subsystem or component of a vehicle's service brake system, or (b) a vehicle's parking brake system or any subsystem or component of a vehicle's parking brake system.

A claim or incident involving serious injury or death is any written demand, complaint, subrogation request or lawsuit received by a manufacturer from or on behalf of the person seriously or fatally injured that (a) involves "serious injury", as further defined, or death, (b) alleges that a product defect was, at least in part, a contributing cause of the serious or fatal injury, and (c) contains sufficient information to identify the motor vehicle or item of motor vehicle equipment involved.

A claim for property damage is any written demand, complaint, subrogation request, or lawsuit received by a manufacturer from or on behalf of the person who suffers the property damage, including a person's insurer, that (a) alleges property damage as a result of a crash, tire failure, or fire, (b) alleges that a product defect was, at least in part, a contributing cause of the property damage, and (c) contains sufficient information to identify the motor vehicle or item of motor vehicle equipment involved.

Covered Vehicle means a motor vehicle that is (a) certified as being in compliance with all applicable federal motor vehicle safety standards codified at 49 CFR Part 571 or (b) a "substantially similar vehicle".

Covered Vehicle System means (a) a braking system, fuel system, restraint system, or steering system incorporated into a covered vehicle, (b) axle, suspension or brake components on heavy trucks and trailers, or (c) motor vehicle tires.

Customer satisfaction campaigns, consumer advisories, recalls, or other activity involving the repair or replacement of motor vehicles or items of motor vehicle equipment shall mean those actions, other than foreign recalls or other safety campaigns as further defined, undertaken or authorized by a manufacturer in which a class of affected owners of motor vehicles or items of motor vehicle equipment are notified of an offer to repair or replace the vehicle or equipment or to extend any applicable vehicle or equipment warranty.

Dealer Report means (a) a non-privileged technical report prepared by the authorized technical staff of a manufacturer's franchised dealer involving (b) a single incident in the field or several similar incidents in the field, (c) a covered vehicle system, and (d) a vehicle (or vehicles) that has been sold to a purchaser for purposes other than resale, but does not include a report of a customer complaint that is passed through to the manufacturer without any technical analysis.

Engine Family means the basic classification unit of a manufacturer's product line used for the purpose of test fleet selection and determined in accordance with 40 CFR Parts 86.096-24 and 86.098-24.

Field Report means a (a) non-privileged technical report prepared by a manufacturer's technical staff involving (b) a single incident in the field or several similar incidents in the field, (c) a covered vehicle system, and (d) a vehicle (or vehicles) that has been sold to a purchaser for purposes other than resale.

Foreign Recall or Other Safety Campaign means a manufacturer-initiated or government-ordered action conducted outside of the territorial United States involving more than one covered vehicle or covered item of motor vehicle equipment undertaken to remedy a defect relating to motor vehicle safety or a non-compliance with an applicable foreign motor vehicle safety standard.

Fuel System means all components used to receive and store fuel and to deliver fuel to the vehicle's engine in motor vehicles.

International Reporting Region means the region comprised of Australia, Canada, Germany, Japan, Mexico, and the United Kingdom.

Model Year means a manufacturer's annual production period for a particular make/model of a motor vehicle or item of motor vehicle equipment which includes January 1 of a calendar year; however, if the manufacturer has no annual production period, the term "model year" shall mean the calendar year.

Original Equipment Part means a part present in or on a vehicle at the time the vehicle is delivered to the ultimate purchaser, except for components installed by a dealer which are not supplied by the vehicle manufacturer or are not installed with the authorization of the vehicle manufacturer.

Owner means the original purchaser or lessee of a motor vehicle or item of motor vehicle equipment for purposes other than resale, or any subsequent purchaser or lessee of that vehicle.

Reportable fire is a report received by a manufacturer that (a) alleges property damage to a motor vehicle or item of motor vehicle equipment resulting from exposure to flame, (b) contains an allegation that the flame was, at least in part, caused by a product defect, and (c) contains sufficient information to identify the motor vehicle.

Reportable rollover is a report received by a manufacturer that (a) involves a dynamic event in which a motor vehicle overturns, (b) contains an allegation that the rollover was, at least in part, caused by a product defect, and (c) contains sufficient information to identify the motor vehicle.

Restraint System means (a) any seat belt assembly as defined by FMVSS No. 209, (b) any inflatable restraint system installed to reduce the risk of injury in crashes, (c) any child restraint system as defined by FMVSS No. 213 or (d) any restraint anchorage as defined by FMVSS No. 210 or child restraint anchorage system as defined by FMVSS No. 225.

Serious Injury means any non-fatal injury resulting in hospital admission (but not including emergency room treatment if the person was treated and released).

Steering System means (a) a steering control system as defined by FMVSS No. 203 or any subsystem or component of a steering control system, (b) a steering column as defined by FMVSS No. 204 or (c) a steering shaft as defined by FMVSS No. 204.

Substantially Similar Vehicle means a motor vehicle identified according to procedures established by the Administrator that is in (a) substantial compliance with Federal Motor Vehicle Safety Standards and (b) that has the same vehicle platform, body shell (except for the number of doors), same engine displacement, and an engine within the same engine family.

Warranty Claims means claims submitted by a manufacturer's franchised dealer or other manufacturer-authorized repair facility to that manufacturer that results in reimbursement by the manufacturer for repairs made under the manufacturer's express product warranty.

ALLIANCE OF AUTOMOBILE MANUFACTURERS
ATTACHMENT 2

Total Motor Vehicle Registrations by Country
Sources: (1) Ward's Motor Vehicle Facts Figures 2000
(2) Central Intelligence Agency World Fact Book 2000

Line No.	Region Country	1998 Passenger Cars	1998 Commercial Vehicles	1998 Total	% of World	Comparative Statistics Area	Persons Per Car
	AFRICA						
1	Algeria	320,100	432,500	752,600	0.11%	< 3.5 x TX	96.1
2	Angola	28,200	30,600	58,800	0.01%	< 2x TX	442.5
3	Benin	7,300	6,200	13,500	0.00%	< PA	813.3
4	Botswana	83,800	77,700	161,500	0.02%	< TX	19.1
5	Burkina Faso	35,500	19,500	55,000	0.01%	< CO	327.2
6	Burundi	8,200	11,800	20,000	0.00%	< MD	800.6
7	Cameroon	50,400	47,700	98,100	0.01%	< CA	291.5
8	Central African Republic	400	400	800	0.00%	< TX	8,875.0
9	Congo	29,000	16,600	45,600	0.01%	< MT	98.8
10	Ethipoia	55,644	43,797	99,441	0.01%	< 2x TX	1,098.0
11	Ghana	32,600	38,400	71,000	0.01%	< OR	603.6
12	Ivory Coast	78,100	36,300	114,400	0.02%		186.0
13	Kenya	46,988	60,239	107,227	0.02%	< 2x NV	628.9
14	Liberia	17,400	10,700	28,100	0.00%	< TN	168.4
15	Libya	305,900	180,900	486,800	0.07%	< AK	17.9
16	Madagascar	11,500	17,000	28,500	0.00%	< 2x AZ	1,347.6
17	Malawi	9,000	12,300	21,300	0.00%	< PA	1,182.2
18	Mali	6,300	7,600	13,900	0.00%	< 2x TX	1,739.7
19	Mauritania	5,400	6,600	12,000	0.00%	> 3x NM	481.1
20	Mauritius	80,578	30,197	110,775	0.02%	11x DC	14.3
21	Morocco	178,043	132,907	310,950	0.05%	3x National Mall	156.5
22	Mozambique	27,200	14,500	41,700	0.01%	< 2x CA	709.0
23	Niger	7,100	7,400	14,500	0.00%	< 2x TX	1,464.8
24	Nigeria	589,600	363,900	953,500	0.14%	> 2x CA	184.8
25	Reunion	180,400	33,000	213,400	0.03%	< RI	3.8
26	Senegambia	28,200	24,300	52,500	0.01%		372.6
27	Sierra Leone	32,400	11,900	44,300	0.01%	< SC	145.6
28	South Africa	3,952,201	1,868,000	5,820,201	0.88%	< 2x TX	10.1
29	Sudan	11,600	28,600	40,200	0.01%	> 0.25 US	2,489.9
30	Tanzania	13,800	42,500	56,300	0.01%	> 2x CA	2,376.3
31	Togo	74,700	34,600	109,300	0.02%	< WV	60.4
32	Tunisia	137,876	107,620	245,496	0.04%	> GA	68.6
33	Uganda	7,900	19,100	27,000	0.00%	< OR	2,676.3
34	Zaire	32,900	28,700	61,600	0.01%		1,529.9
35	Zambia	24,900	26,200	51,100	0.01%	> TX	360.5
36	Zimbabwe	80,600	77,500	158,100	0.02%	> MT	143.0
	Regional Total	**6,591,730**	**3,907,760**	**10,499,490**	**1.58%**		
	AMERICA, Caribbean						
37	Bahamas	67,400	16,800	84,200	0.01%	< CT	4.5
38	Barbados	56,868	6,361	63,229	0.01%	2.5x DC	4.7
39	Bermuda	19,900	4,300	24,200	0.00%	0.3x DC	3.1
40	Cuba	10,600	11,100	21,700	0.00%	< PA	1,052.8
41	Dominican Republic	120,000	140,000	260,000	0.04%	< 2x NH	69.7
42	Guadeloupe	108,700	35,600	144,300	0.02%	10x DC	4.1
43	Haiti	20,200	23,100	43,300	0.01%	< MD	400.3
44	Jamaica	97,300	44,000	141,300	0.02%	< CT	26.3
45	Netherlands Antilles	72,563	26,722	99,285	0.01%	> 5x DC	3.0

Total Motor Vehicle Registrations by Country
Sources: (1) Ward's Motor Vehicle Facts Figures 2000
(2) Central Intelligence Agency World Fact Book 2000

Line No.	Region / Country	1998 Passenger Car	1998 Commercial Vehicles	1998 Total	% of World	Comparative Statistics Area	Comparative Statistics Persons Per Car
46	Puerto Rico	746,608	247,847	994,455	0.15%	< 3x RI	5.1
47	Trinidad and Tobago	61,900	20,500	82,400	0.01%	< DE	20.8
48	Virgin Islands (U.S.)	20,500	11,000	31,500	0.00%	2x DC	5.9
	Regional Total	**1,402,539**	**589,328**	**1,989,869**	**0.30%**		
	AMERICA, Central & South						
49	Argentina	3,468,082	647,119	4,115,201	0.62%	< 0.3 US	10.5
50	Belize	2,805	3,011	5,816	0.00%	< MA	83.8
51	Bolivia	37,000	82,000	119,000	0.02%	< 3x MT	220.1
52	Brazil	10,828,765	2,429,511	13,258,276	2.00%	< US	15.5
53	Chile	1,020,516	679,897	1,700,413	0.26%	< 2x MT	14.7
54	Colombia	725,384	420,898	1,146,282	0.17%	< 3x MT	57.3
55	Costa Rica	92,800	126,400	219,200	0.03%	< WV	42.4
56	Ecuador	186,050	220,000	406,050	0.06%	< NV	66.7
57	El Salvador	49,016	56,738	105,754	0.02%	< MA	125.6
58	French Guiana	28,200	9,900	38,100	0.01%	< IN	6.0
59	Guatemala	90,203	97,163	187,366	0.03%	< TN	122.9
60	Guyana	9,500	3,200	12,700	0.00%	< ID	90.0
61	Honduras	17,242	53,947	71,189	0.01%	> TN	366.3
62	Nicaragua	31,176	50,459	81,635	0.01%	< NY	158.4
63	Panama	169,217	104,037	273,254	0.04%	< SC	16.6
64	Paraguay	75,746	75,750	151,496	0.02%	< CA	70.7
65	Peru	323,981	220,232	544,213	0.08%	< AK	77.9
66	Suriname	20,400	31,800	52,200	0.01%	> GA	20.3
67	Uraguay	308,500	99,100	407,600	0.06%	< WA	10.7
68	Venezuela	1,444,000	434,000	1,878,000	0.28%	> 2x CA	16.4
	Regional Total	**18,928,583**	**5,845,162**	**24,773,745**	**3.74%**		
	AMERICA, North (NAFTA)						
69	Canada	13,887,270	3,694,077	17,581,347	2.65%	> US	2.2
70	Mexico	4,950,000	2,800,000	7,750,000	1.17%	< 3x TX	19.7
71	United States	131,838,538	79,062,475	210,901,013	31.81%		2.1
	Regional Total	**150,675,808**	**85,556,552**	**236,232,360**	**35.63%**		
	ASIA, Far East						
72	Afghanistan	9,100	600	9,700	0.00%	< TX	2,409.1
73	Bangladesh	57,068	75,599	132,667	0.02%	< WI	2,224.5
74	Brunei	94,136	14,766	108,902	0.02%	< DE	3.4
75	Burma	5,100	11,500	16,600	0.00%	< TX	8,835.1
76	Hong Kong	715,377	262,037	977,414	0.15%	6x DC	9.5
77	India	4,820,000	2,610,000	7,430,000	1.12%	> 0.3x US	207.1
78	Indonesia	491,457	2,097,674	2,589,131	0.39%	< 3x TX	425.8
79	Japan	50,353,749	20,855,831	71,209,580	10.74%	< CA	2.5
80	South Korea	7,850,926	2,888,673	10,739,599	1.62%	> IN	5.9
81	Malaysia	2,373,200	445,824	2,819,024	0.43%	> NM	9.2
82	Pakistan	322,513	227,198	549,711	0.08%	< 2x CA	472.3
83	Peoples Republic of China	2,940,243	8,313,493	11,253,736	1.70%	< US	430.9
84	Philippines	749,204	579,244	1,328,448	0.20%	> AZ	99.4
85	Singapore	393,103	142,615	535,718	0.08%	> 3.5x DC	9.0

Total Motor Vehicle Registrations by Country
Sources: (1) Ward's Motor Vehicle Facts Figures 2000
(2) Central Intelligence Agency World Fact Book 2000

Item No	Region/ Country	1998 Passenger Car	1998 Commercial Vehicles	1998 Total	1998 % of World	Comparative Statistics: Size	Comparative Statistics: Persons Per Car
86	Sri Lanka	210,600	319,700	530,300	0.08%	> WV	88.5
87	Taiwan	4,536,605	834,158	5,370,763	0.81%	< MD + DE	4.9
88	Thailand	1,712,900	3,442,500	5,155,400	0.78%	> 2x WY	35.5
89	Vietnam	76,500	103,385	179,885	0.03%	> NM	1,028.8
	Regional Total	**77,711,781**	**43,226,795**	**120,936,578**	**18.24%**		
	ASIA, Middle East						
90	Bahrain	81,074	29,272	110,346	0.02%	3.5x DC	7.5
91	Cyprus	193,980	88,953	282,933	0.04%	0.6x CT	4.0
92	Egypt	628,017	508,080	1,136,097	0.17%	> 3x NM	107.0
93	Iran	684,500	355,100	1,039,600	0.16%	> AK	97.6
94	Iraq	154,700	137,200	291,900	0.04%	> 2x ID	145.1
95	Israel	1,073,570	288,211	1,361,781	0.21%	< NJ	5.7
96	Jordan	74,217	77,552	151,769	0.02%	< IN	87.3
97	Kuwait	372,967	185,501	558,468	0.08%	< NJ	5.1
98	Lebanon	385,961	171,005	556,966	0.08%	0.7x CT	8.4
99	Oman	205,577	190,367	395,944	0.06%	< KS	12.0
100	Qatar	66,100	67,638	133,738	0.02%	< CT	8.9
101	Saudi Arabia	1,032,071	1,005,006	2,037,077	0.31%	0.2x US	20.2
102	Syria	81,867	174,550	256,417	0.04%	> ND	192.1
103	Turkey	3,838,631	1,317,349	5,155,980	0.78%	> TX	17.1
104	United Arab Emirates	742,874	419,650	1,162,524	0.18%	< ME	3.2
105	Yemen	264,000	321,700	585,700	0.09%	> 2x WY	66.2
	Regional Total	**9,880,106**	**5,337,134**	**15,217,240**	**2.30%**		
	EUROPE, East						
106	Bulgaria	1,809,350	283,755	2,093,105	0.32%	> TN	4.6
107	Czechoslovakia (former)	4,895,247	600,409	5,495,656	0.83%	< SC	3.2
108	Hungary	2,365,000	370,686	2,735,686	0.41%	< IN	4.3
109	Poland	5,603,398	939,608	6,543,006	0.99%	< NM	6.9
110	Romania	2,391,900	513,300	2,905,200	0.44%	< OR	9.4
111	Soviet Union (former)	14,689,100	9,856,000	24,545,100	3.70%	< 1.8x US	22.2
112	Yugolsavia (former)	1,312,000	343,800	1,655,800	0.25%		17.5
	Regional Total	**33,065,995**	**12,907,558**	**45,973,553**	**6.93%**		
	EUROPE, West						
113	Austria	3,887,174	752,135	4,639,309	0.70%	< ME	2.1
114	Belgium & Luxembourg	4,702,139	569,934	5,272,073	0.80%	MD + RI	2.2
115	Denmark	1,877,117	311,442	2,188,559	0.33%	< 2x MA	2.8
116	Finland	2,021,116	289,650	2,310,766	0.35%	< MT	2.6
117	France	26,800,000	5,500,000	32,300,000	4.87%	< 2x CO	2.2
118	Germany	41,673,781	4,356,511	46,030,292	6.94%	< MT	2.0
119	Gibraltar	21,900	12,400	34,300	0.01%	11x National Mall	1.3
120	Greece	2,675,676	1,013,677	3,689,353	0.56%	< AL	4.0
121	Iceland	140,372	18,094	158,466	0.02%	< KY	2.0
122	Ireland	1,196,901	188,219	1,385,120	0.21%	< WV	3.1
123	Italy	27,000,001	3,000,000	30,000,001	4.52%	> AZ	2.1
124	Malta	175,020	43,957	218,977	0.03%	< 2x DC	2.2
125	Netherlands	5,931,000	709,000	6,640,000	1.00%	< 2x NJ	2.7
126	Norway	1,786,404	427,047	2,213,451	0.33%	> NM	2.5

Total Motor Vehicle Registrations by Country
Sources: (1) Ward's Motor Vehicle Facts Figures 2000
(2) Central Intelligence Agency World Fact Book 2000

WVC No	Nation / Country	1998 Passenger Cars	1998 Commercial Vehicles	1998 Total	1998 % of World	Comparative Statistics 1997	Comparative Statistics Persons Per Car
127	Portugal	3,150,000	1,085,200	4,235,200	0.64%	< IN	3.1
128	Spain	16,050,057	3,561,556	19,611,613	2.96%	< 2x OR	2.5
129	Sweden	3,792,056	353,215	4,145,271	0.63%	> CA	2.3
130	Switzerland	3,383,273	282,841	3,666,114	0.55%	< 2x NJ	2.2
131	United Kingdom	22,115,000	3,168,900	25,283,900	3.81%	< OR	2.7
	Regional Total	**168,378,987**	**25,645,776**	**194,022,765**	**29.26%**		
	PACIFIC						
132	Australia	8,400,102	2,266,098	10,666,200	1.61%	< US	2.2
133	Fiji	16,300	19,700	36,000	0.01%	< NJ	49.4
134	French Pacific Ocean	38,700	22,700	61,400	0.01%		6.0
135	Guam	125,100	43,500	168,600	0.03%	3x DC	1.3
136	New Caledonia	60,600	25,100	85,700	0.01%	< NJ	3.5
137	New Zealand	1,789,669	456,906	2,246,575	0.34%	= CO	2.1
138	Papua New Guinea	21,700	89,700	111,400	0.02%	> CA	216.7
139	Samoa (America)	5,400	5,500	10,900	0.00%	> DC	32.8
140	Vanuatu	2,700	3,800	6,500	0.00%	> CT	68.9
	Regional Total	**10,460,271**	**2,933,004**	**13,393,275**	**2.02%**		
	WORLD TOTAL	**477,095,800**	**185,943,075**	**663,038,875**	**100.00%**	16x US	

Total Motor Vehicle Registrations by Country
Sources: (1) Ward's Motor Vehicle Facts Figures 2000
(2) Central Intelligence Agency World Fact Book 2000

INTERNATIONAL REPORTING REGION vs. TERRITORIAL UNITED STATES

List No.	Region Country	1998 Passenger Cars	1998 Commercial Vehicles	1998 Total	% of World	Comparative Statistics Area	Comparative Statistics Persons Per Car
	Previously Existing US & Terr.						
46	Puerto Rico	746,608	247,847	994,455			5.1
48	Virgin Islands (U.S.)	20,500	11,000	31,500			5.9
71	United States	131,838,538	79,062,475	210,901,013			2.1
135	Guam	125,100	43,500	168,600			1.3
139	Samoa (America)	5,400	5,500	10,900			32.8
	Subtotal (US)	**132,736,146**	**79,370,322**	**212,106,468**	**32%**		
ADD	**NAFTA**						
69	Canada	13,887,270	3,694,077	17,581,347		> US	2.2
70	Mexico	4,950,000	2,800,000	7,750,000		< 3x TX	19.7
ADD	**EUROPEAN UNION**						
118	Germany	41,673,781	4,356,511	46,030,292		< MT	2.0
131	United Kingdom	22,115,000	3,168,900	25,283,900		< OR	2.7
ADD	**ASIA-OCEANIA**						
79	Japan	50,353,749	20,855,831	71,209,580		< CA	2.5
132	Australia	8,400,102	2,266,098	10,666,200		< US	2.2
	Subtotal (Intl. Reporting Region)	**141,379,902**	**37,141,417**	**178,521,319**	**27%**	>> 2x US	
	TOTAL (Worldwide)	***274,116,048***	***116,511,739***	***390,627,787***	***59%***		

[redacted]

MFR.:

Reporting Quarter:

Date:

Model Year:
Make:
Model:
Prod. Vol.:

[redacted]	SYSTEM	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	THRESHOLD	x%	y%	w%	x%	y%
[redacted]	REGION					
[redacted]	US + IRR	N (%)	N (%)	N (%)	N (%)	N (%)
[redacted]	US	N (%)	N (%)	N (%)	N (%)	N (%)
[redacted]	US	N (%)	N (%)	N (%)	N (%)	N (%)

N = NUMBER OF CLAIMS RECEIVED
% = NUMBER OF CLAIMS RECEIVED AS A PERCENTAGE OF PRODUCTION VOLUME

[redacted]		[redacted]	[redacted]
Serious Injuries	(alleged to be caused by defect)	Global	N
Fatal Injuries	(alleged to be caused by defect)	Global	N
Fire Allegations		US	N
Rollover Allegations		US	N

[redacted]

[redacted]

MFR.:
Model Year: 2001MY, *2002MY

Date:

Make	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Lexus	LS430*	Celsior	LS430	LS430	LS430
	GS300/GS430	Aristo	GS300/GS430	GS300	GS300
	SC430*				
	ES300	Windom		ES300	ES300
	IS300	Altezza	IS200	IS200	IS200
	LX470	Cygnus/Land Cruiser (100 s)		LX470	LX470
	RX300	Harrier	RX300		RX300
Toyota	Avalon	Pronard			Avalon
	Camry	Camry	Camry	Camry	Camry
	Camry Solara				
	Celica	Celica	Celica	Celica	Celica
	Prius	Prius			
	Corolla	Corolla (new model)	Corolla	Corolla	Corolla
	Echo	Platz, Vitz	Yaris (Yaris Verso)	Echo	Echo, Echo Verso, Yaris, Yaris V
	MR2 Spyder	MR5			
	Land Cruiser	Land Cruiser (100 s)/Cygnus		LX470	LX470
	Sequoia				
	Highlander*	Kluger V			
	4Runner	Hilux Surf			
	Sienna				
	RAV4	RAV4	RAV4	RAV4	RAV4
	Tundra				
	Tacoma				

[redacted]

The ANPRM listed the following categories of companies that might be included in an early warning system:

- Motor Vehicle Manufacturers
  - Domestic Vehicle Manufacturers
  - Foreign Vehicle Manufacturers
  - Multinational Vehicle Manufacturers
- Registered Importers
- Miscellaneous Vehicle Manufacturers
  - Vehicles Manufactured in 2 or More Stages
- Motor Vehicle Equipment Manufacturers
  - Original Equipment Manufacturers
  - Replacement/Accessory Equipment Manufacturers
  - Child Seat Manufacturers
  - Off-Vehicle Equipment Manufacturers
  - Importers of Motor Vehicle Equipment for Resale
- Tire Manufacturers
  - Domestic Tire Manufacturers
  - Foreign Tire Manufacturers

1. Which of the manufacturers listed above should be covered by the final rule and why?

Response: The Alliance recommends that early warning reporting of trends associated with systems and components that are installed as original equipment on a new motor vehicle should be made only in a vehicle context and that separate tracking and reporting of trends involving replacement and aftermarket equipment should be done by those replacement equipment manufacturers.

Thus, motor vehicle manufacturers with a nexus to the United States should be covered by the final rule, as we discussed in more detail in our cover letter. However, for this same reason, the supplier of an "original equipment part", as the Alliance has defined that term (see Attachment 1), should be excluded from these requirements (unless the supplier is also manufacturing replacement equipment) because those manufacturers are unlikely to provide any significant information not available from vehicle manufacturers. Such a requirement would increase substantially the burden and complexity of NHTSA's information gathering system. Miscellaneous vehicle manufacturers should be covered but only for purposes of reporting trends associated with systems and components they install or modify when completing the motor vehicle, as should Registered Importers importing vehicles needed conforming modifications. The Alliance agrees with NHTSA that manufacturers of motor vehicle apparel need not be subject to this rulemaking.

The TREAD Act did not change the Vehicle Safety Act's definition of "manufacturer," which is defined as "a person – (A) manufacturing or assembling motor vehicles or motor vehicle equipment; or (B) importing motor vehicles or motor vehicle equipment for resale." A manufacturer that is located outside the United States and offers a motor vehicle (or item of motor vehicle equipment) for import into the United States is required by § 30164 of the Vehicle Safety Act to designate an agent in the United States to accept service of notices and process from NHTSA on behalf of the foreign manufacturer. If a foreign manufacturer offering a motor

vehicle or motor vehicle equipment for import into the United States fails to designate an agent, the statute provides that service on that manufacturer may be effected by posting the notice or process in the Office of the Secretary of Transportation.

In the ANPRM, NHTSA has correctly interpreted the definition of "manufacturer" as extending only to those foreign entities engaged in "manufacturing or assembling motor vehicles" that are "shipped to and sold in" the United States. 66 Fed.Reg. 6532, 6535. Although NHTSA does not include that limitation in its description of "multinational" manufacturers, the Alliance did not understand NHTSA to be asserting jurisdiction over entities that have no nexus to the United States. To our knowledge, NHTSA has never attempted to assert jurisdiction under the Vehicle Safety Act over companies such as Lada that do not build vehicles for sale in the United States. The TREAD Act does not change this traditional understanding of the definition of manufacturer. The statutory definition of manufacturer also does not extend to an independent corporation that is affiliated with a "manufacturer" (such as a subsidiary) but which does not, itself, engage either in "manufacturing or assembling motor vehicles or motor vehicle equipment," or in the importation of such products into the United States. Thus, for example, Hertz, a wholly owned subsidiary of Ford that may well receive consumer complaints, is not a "manufacturer" because it is an independent corporation engaged in businesses other than manufacturing, assembling or importing motor vehicles or motor vehicle equipment.

Finally, the Safety Act and the TREAD Act do not extend to an independent corporation that is affiliated with a "manufacturer" and that is engaged in manufacturing or assembling motor vehicles (or motor vehicle equipment) exclusively for markets outside the United States. Thus, for example, Shanghai Volkswagen Automotive Co. Ltd. is not a "manufacturer" subject to the Safety Act or the TREAD Act unless and until that company begins to manufacture a vehicle for the United Sates market.

Since the scope and magnitude of the reporting and other obligations under the TREAD Act depend on a clear understanding of who is covered by the new requirements, the Alliance requests that NHTSA confirm that the interpretations discussed above are correct.

With respect to information "in foreign countries," there is not an obvious issue of ***constructive*** possession. If a manufacturer subject to the Safety Act and the TREAD Act actually possesses information that is reportable under TREAD, the fact that the information is located in a foreign country does not convert its status from actual possession to constructive possession. Under these facts, information in foreign countries is still "actually possessed" by the manufacturer. If, however, NHTSA's reference to information in foreign countries was intended to suggest that information in the possession of foreign (or for that matter, domestic) affiliated companies or independent companies would be imputed to the manufacturer, the Alliance disagrees. First, the very notion of "constructive" possession means that the manufacturer does not have "actual" possession of the information. That should end the inquiry, because under the TREAD Act, NHTSA cannot compel the reporting of information that is "not in the possession of the manufacturer." Section 30166(m)(4)(B). If the manufacturer does not have actual possession of the data, it cannot be reported under TREAD. Second, there is no basis in the Vehicle Safety Act, the TREAD Act or ordinary principles of corporate law to impute to a manufacturer data or other information that is solely in the possession of an independent affiliated company or a completely independent one. At least under the corporate laws in the United States, separately incorporated companies in a parent-subsidiary relationship are presumed to be independent business entities that generally do not control one another's day-to-day business operations. According to a leading treatise on corporate law, "...even when the parent exercises domination and control over the subsidiary, corporate separateness will be recognized. Thus, under ordinary circumstances, a

parent corporation will not be liable for the obligations of its subsidiary." Likewise, a subsidiary is not ordinarily liable for the obligations of its parent. On the other hand, evidence that a corporation conducts its affairs so that it routinely and automatically obtains and passes along information from a subsidiary can be used to "pierce the corporate veil" between the parent and the subsidiary, and cause the parent to be responsible for the liabilities of its subsidiary, thereby defeating the purpose of establishing a separate corporate entity in the first place. (Quoted passages are from Fletcher Cyclopedia of the Law Of Private Corporations, Section 43 (1999 Ed.))

The net effect of NHTSA's proposal to establish a presumption of "constructive possession" of information between parent and subsidiary corporations is to establish a mandatory parent-subsidiary reporting system, because the corporate entity that is under NHTSA's jurisdiction would have to ensure that it received the information in order to report it to NHTSA under TREAD. It is inappropriate for NHTSA to establish a presumption that requires one corporation to be a regular and automatic reporter of the other corporation's data, when that very activity is the sort of evidence that can be cited in other contexts to "pierce the corporate veil" between the entities. It would be equally inappropriate to presume "constructive possession" when a manufacturer has a business relationship for the production or distribution of vehicles with a completely independent entity.

Under the TREAD Act NHTSA cannot compel the maintenance or production of information that is not in the possession of the manufacturer. §30166(m)(4)(B) of the Vehicle Safety Act as added by TREAD. The Alliance understands that this provision was included to ensure that manufacturers could not be compelled to expend the effort to collect or create information it does not otherwise have in their possession. Put another way, Congress wanted each manufacturer to share with NHTSA certain "early warning" indicators that are known to, and in the possession of, the manufacturer, but not to require the manufacturer to solicit or create information for TREAD purposes that it would not otherwise have in the ordinary course of business.

In the ANPRM, NHTSA seems to agree with this understanding of § 30166(m)(4)(B) when it interpreted this section as "prohibiting [NHTSA] from imposing a requirement that a manufacturer collect data that it does not possess." 66 Fed.Reg. at 6543.

For this reason, the Alliance strongly disagrees with NHTSA's proposal to consider information to be "in the possession of a manufacturer" if it is information in "foreign countries, or information possessed by outside counsel or consultants to the company." 66 Fed. Reg. At 6543.

With respect to outside counsel, it is unlikely that a manufacturer's outside counsel would possess non-privileged, responsive information that is not also in the possession of his or her client, the manufacturer. For example, information developed for discovery responses comes from the manufacturer's own files. Information generated by, or at the direction of, the attorney for purposes of preparing to defend litigation is entirely privileged from disclosure. The TREAD Act does not require a manufacturer to waive valid attorney-client or work product privileges. Beyond such privileged information, it is unlikely that the outside counsel would have TREAD-responsive information that did not originate with the manufacturer, unless the counsel obtained it independently, such as while working on a matter for a different client. Under these circumstances, the counsel's information could not lawfully or reasonably be imputed to the first manufacturer under the TREAD Act or the Vehicle Safety Act.

As to outside contractors, most (if not all) outside contractors in the motor vehicle industry work for more than one manufacturer. Read literally, NHTSA's proposal would impute to ***every***

manufacturer employing that contractor ***all*** TREAD-responsive information in the possession of that contractor, regardless of which company commissioned the work. For example, if an outside contractor comes into possession of TREAD-responsive information concerning manufacturer X while working on a project for manufacturer Z, would manufacturer X be in "constructive possession" of the information merely because it has retained the contractor on an unrelated project? (This concern also pertains to outside counsel who may work for more than one vehicle manufacturer.)

Neither the Safety Act nor the TREAD Act contains any authority to impose vicarious liability on a manufacturer for failing to report information it did not possess, but which its contractor or counsel possesses. If, however, NHTSA is simply concerned that a manufacturer may attempt to transfer information it has received to outside counsel or a contractor and then claim it does not have actual possession of the information, the Alliance agrees that this would be inappropriate. However, there is no need to address this issue through the broad and hard-to-define legal fiction of "constructive possession"; NHTSA's record retention rules currently require manufacturer's to maintain the type of records to be covered by an early warning rule, and manufacturers cannot lawfully discard them.

2. Are there other entities that should be covered by the reporting requirements and why?

Response: Please see the answer to 1 above.

3. Should any of the above manufacturers or other entities be covered by only some reporting requirements and not others?

Response: The early warning reporting requirements should be focused on the systems NHTSA identified in the ANPRM as appropriate for an early warning system: braking systems, steering systems, fuel systems, and restraint systems on all motor vehicles; axle/suspension systems on heavy trucks, tires and child restraints. The Alliance recommends that the early warning reporting system include "covered vehicles", and "covered vehicle systems," as the Alliance has defined these terms (see Attachment 1). If the Alliance's recommended reporting format is adopted, a version of that format could be adapted for heavy truck manufacturers (by adding a category for axle/suspension systems). A version of the recommended reporting format could also be adapted for replacement equipment manufacturers (who would report only to the extent the reportable incident involved an item of replacement or aftermarket equipment, to avoid double counting the incidents that would be reported by the motor vehicle manufacturer.) A version of the report could also be adapted for tire and child restraint manufacturers.

4. With respect to manufacturers' international feedback mechanisms, to what extent is information provided in the English language? Are there delays in transmitting information such as narrative field reports due to the need to translate it into English? If so, what is the length of delays?

Response: Much of the information discussed in the ANPRM is not provided in the English language, nor are they translated into English now if there is no business need to do so. So, for example, a field report generated in Germany or Japan by a technical employee of a German or Japanese auto manufacturer will be written in German or Japanese. Because there is no need to translate those reports into English now as a routine matter, it is not possible to estimate the delay and burden that would be associated with any requirement to translate each such report into English; however, it would be enormous. For example, one member of the Alliance recently received estimates of $0.12 per word for translating field reports from Spanish to English. For

this reason, the Alliance recommends that field reports involving covered vehicle systems (and generated within an international reporting region discussed elsewhere in the Alliance comments) be counted, and the count reported to NHTSA quarterly without requiring automatic translation and submission of the copies. The same considerations apply to many of the business records described in the ANPRM as potential categories for inclusion in an early warning system. Additional information may be provided in individual Alliance member submissions to this docket.

5. What accessories could develop safety-related defects?

Response: It is not possible to enumerate the problems that can arise with after market accessories. This is one reason why manufacturers of replacement and aftermarket equipment should be subject to appropriate reporting requirements for their products that are not installed as original equipment.

1. ***Which offices of manufacturers receive, classify, and evaluate warranty and claims data, and other data or information, related to deaths, serious injuries, and property damage involving a manufacturer's products that occur in the United States?***

Response: The Alliance does not have responsive information.

2. ***In what form is that data received and maintained? If it is maintained electronically, please describe the data base system in which it is kept.***

Response: The Alliance does not have responsive information.

3. ***Is the information referred to in question 1 otherwise classified (for example, warranty codes, lawsuits)? If so, how? By whom is such information evaluated?***

Response: The Alliance does not have responsive information.

4. ***Do manufacturers in the United States (defined to include importers of vehicles or equipment for resale), currently receive warranty and claims data, and other data or information, related to deaths, serious injuries, and property damage involving their products that occur outside the United States? If so, in what form are these data received?***

Response: The Alliance does not have responsive information.

5. ***If a manufacturer in the United States does not receive, maintain, and evaluate such data or information referred to in paragraph 3 above, what entity does (e.g., foreign affiliate, factory-authorized importer, outside counsel, other third-party entity)? Do manufacturers require that entity to make periodic reports to it?***

Response: The Alliance does not have responsive information.

6. ***In what form is the foreign data or information received (e.g., electronically, e-mail, inter-company memo)? Is it maintained separately or is it combined with data about events occurring in the United States?***

Response: The Alliance does not have responsive information.

7. ***What is the length of time that manufacturers maintain warranty data and claims data? Is this period different for data related to events occurring outside the United States?***

Response: The Alliance does not have responsive information.

8. ***Are U.S. dealers currently collecting and/or maintaining information relevant to early warning reporting? If so, what is this information, and to what extent is it furnished to the manufacturer?***

Response: Alliance members generally do not require dealers to maintain such information. Some member companies operate information reporting systems by which dealers can input information directly to the companies' various systems for collecting such information. These systems vary widely among member companies and descriptions of them are best provided by the companies themselves.

It should also be noted that franchised dealers are independent business entities. Dealers are free to maintain any files they determine are necessary to conduct business. Manufacturers do not know what records dealers may choose to maintain.

9. ***Should there be a cut off date for reporting (e.g., not require it regarding vehicles or equipment that are older than some specified age)? If so, what age or ages?***

Response: Yes. Data relevant to early warning reporting necessarily declines over time as vehicles come off warranty, are sold to second and third owners, and customers turn to repair facilities not associated with a manufacturer's franchised dealer for repairs and maintenance. The Alliance recommends that reporting requirements cover a rolling 5 model year period.

10. ***Is there additional information or data beyond that mentioned in this notice that manufacturers should report to NHTSA that would assist in the identification of defects related to motor vehicle safety? For example, assembly plant quality reports, dealer feedback summaries, test fleet summary reports, fleet experience, and rental car company reports.***

Response: No.

1. ***What is the appropriate definition of "claim"?***

Response: The Alliance recommends that separate definitions of "property damage claim", and "warranty claim", as follows:

> *A claim for property damage* is any written demand, complaint, subrogation request, or lawsuit received by a manufacturer from or on behalf of the person who suffers the property damage, including a person' s insurer, that (a) alleges property damage as a result of a crash, tire failure, or fire, (b) alleges that a product defect was, at least in part, a contributing cause of the property damage, and (c) contains sufficient information to identify the motor vehicle or item of motor vehicle equipment involved.
>
> *Warranty Claims* means claims submitted by a manufacturer' s franchised dealer or other manufacturer-authorized repair facility to that manufacturer that results in reimbursement by the manufacturer for repairs made under the manufacturer' s express product warranty.

2. ***What information should be submitted (e.g., just the number of claims by make, model year and component or system, or more information, including summaries and names of complainants)?***

Response: The Alliance recommends that the reporting of "warranty claims" and "property damage claims" should focus on claims related to "covered vehicle systems" installed on "covered vehicles", as the Alliance has defined these terms (see Attachment 1). In addition, warranty claims and property damage claims should be limited to those arising on vehicles sold in the United States, because the volume of such claims is large enough to provide trend data, and the burden associated with obtaining similar information from foreign sources is not outweighed by the very limited value that would be added by the foreign data in these two categories. Reporting of claims should be on a make, model, and model year basis. Reporting obligations should be triggered only after the number of claims received for any individual "covered vehicle system" exceeds a predetermined threshold. The Alliance recommends a standardized reporting format (see Attachment 3-1). Both because of the large volume of data and because of the substantial burden involved in redacting personal identifying information (for privacy reasons), the raw claims data should not be submitted routinely.

3. ***Should NHTSA only require the submission if claims are about problems with certain components? If so, which ones?***

Response: Yes, please see the answer to question no. 2 immediately above. The systems recommended for inclusion in the initial early warning system are the same ones identified by NHTSA in the ANPRM as appropriate for inclusion in the system at its beginning. The Alliance endorses the idea of establishing a system that focuses on the systems most commonly involved in recalls today, then refining that system if appropriate and necessary in the future.

4. Should information about all claims involving serious injuries or deaths be submitted, or should there be some threshold?

Response: The Alliance interprets the TREAD Act to require reporting on all "claims" actually received by manufacturers involving serious injuries or fatalities. The real question here is how to define the term "serious injury" such that the reporting requirements are well understood and objective. Please see discussion in Attachment 5-6 about the challenges of defining "serious injury" in an objective way that is capable of application by laypersons.

As discussed in more detail in Attachment 5-6, the Alliance is skeptical about the value of information derived from lawsuits as an "early warning" tool, because such information is often received long after the vehicle entered commerce and, moreover, is rarely linked to a firm, unchanging allegation of a specific product defect. To be useful to NHTSA as an "early warning" indicator, the information needs to be available "early" in the life of the product (or at least, "early" in the manifestation of the defect) AND traceable to a particular alleged product defect. Lawsuit information simply will not contribute to these goals in a consistent manner. Therefore, while "serious injury" claims are required to be reported, NHTSA's implementing rules should strike an appropriate balance between the burden involved in collecting and reporting this information and the limited value this information will have as an "early warning" system.

1. ***Should warranty data be reported? If so, are there specific categories which should be included or excluded?***

Response: Warranty claims standing alone are poor "early warning" indicators, because warranty claims tracking systems are a business tool used by dealers and authorized service centers to seek reimbursement from a manufacturer for repairs made to vehicles under the terms of an express product warranty. No effort is made at the time of payment to the dealer to determine whether a claim submitted contains an accurate technical description or whether a repair was necessary or appropriate. (see Alliance cover letter and Attachment 5-2). The Alliance recommends that "warranty claims" be defined as follows:

> *Warranty Claims* means claims submitted by a manufacturer' s franchised dealer or other manufacturer-authorized repair facility to that manufacturer that results in reimbursement by the manufacturer for repairs made under the manufacturer' s express product warranty.

Warranty data itself is not an accurate indicator for early warning purposes. Warranty data can be useful as a tool to provide a dimension for concerns identified and quantified by Field Reports, as can property claims information. The Alliance recommends that the reporting of warranty claims should initially focus on "covered vehicle systems" installed on "covered vehicles", as the Alliance has defined these terms (see Attachment 1). In addition, warranty claims and property damage claims should be limited to those arising on vehicles sold in the United States, because the volume of such claims is large enough to provide trend data, and the burden associated with obtaining similar information from foreign sources is not outweighed by the very limited value that would be added by the foreign data in these two categories. Reporting of claims should be on a make, model, and model year basis. Reporting obligations should be triggered only after the number of claims received for any individual "covered vehicle system" exceeds a predetermined threshold. The Alliance recommends a standardized reporting format (see Attachment 3.1). Both because of the large volume of data and because of the substantial burden involved in redacting personal identifying information (for privacy reasons), the raw claims data should not be submitted routinely.

The early warning reporting scheme recommended by the Alliance has some similarities to a system adopted over ten years ago by the California Air Resources Board (CARB see 13 CCR 2144 ~ 2149) in that it proposes to report on specific safety-related systems warranty claims exceeding a certain threshold. Unlike the CARB system, however, the Alliance proposal recommends reporting on a periodic basis with a count of those claims received during a reporting period, in order to allow NHTSA to track trend changes over time. By contrast, the CARB system is a cumulative report of warranty claims above the threshold.

2. ***How do manufacturers maintain warranty data? How long is it kept? For what purposes is it kept? How do manufacturers review warranty data to identify possible safety concerns?***

Response: No Alliance member has a single global system through which all vehicle information flows, nor is there a single corporate entity that receives all information and that can retrieve and analyze the information. Typically, different systems are used for capturing, transmitting, storing and analyzing information, depending upon the business purpose for which the system was originally created. It is worth noting that each of the types of information the ANPRM identifies as possible elements of an early warning system is generally collected by manufacturers for some business purpose other than, and in addition to, assisting in the identification of possible safety defects in vehicles being driven by consumers. For example, the warranty databases at the member companies were created for purposes of tracking the requests by dealers and authorized service centers for reimbursement of repairs performed under an express warranty. Because warranty systems are principally a financial management system, they provide very limited value in terms of an "early warning" system for potential safety defects. Other systems used to report and record information covered by this ANPRM include a variety of manual and electronic systems that are not necessarily compatible with each other. As a result, the method and ability to retrieve information from these different sources vary widely within a given manufacturer, and more significantly from NHTSA's perspective, among the different manufacturers.

Warranty data is typically retained for at least 5 years. Warranty data is used in conjunction with other information, e.g., field reports, to help provide a dimension of potential field concerns, but is not itself a good "early warning" of potential defects. Alliance member companies differ in the manner in which they maintain warranty data (on-line versus stored in other media).

3. ***What thresholds, if any, would be appropriate with respect to specific vehicle components, systems, and equipment items, below which warranty information would not have to be reported to NHTSA? Should there be different thresholds for different components or systems?***

Response: The Alliance recommends that individual thresholds for each system that is contained in the definition of "covered vehicle system", as the Alliance has defined that term (see Attachment 1), should be established. Individual thresholds by "covered vehicle system" might be established. For example, a lower, more conservative threshold might be established for restraint systems. Conversely, the threshold ultimately established for braking systems might be set at a comparatively higher threshold to avoid triggering the reporting requirements as a result of the multitudes of brake claims received for brake squeal and other similar brake complaints that rarely have any safety implication. Thus warranty claims exceeding predetermined thresholds established for each of the covered systems of a covered vehicle sold or leased in the territorial United States would trigger a reporting obligation. The Alliance is not yet able to recommend at this time exact threshold values for each of these systems. The Alliance believes that the reporting thresholds should be based, in part, on past industry-wide experiences with the systems NHTSA chooses to include in the system. Establishment of these thresholds should also depend on the likely consequences of the failure in question. Also see discussion in response to Q. 7, below about the effect on thresholds of the level of generality (or specificity) NHTSA adopts for reporting.

4. ***Should thresholds be based solely on claims rates, or should there be some absolute number of claims that would trigger a reporting requirement?***

Response: Thresholds should be normalized to some base to facilitate comparative evaluations and other analyses. A rate based threshold seems to be the most desirable at this juncture. In addition, NHTSA should specify an absolute minimum number of claims that would trigger a reporting requirement to address the special issues faced by smaller volume manufacturers, for whom a reporting threshold could be reached with relatively few complaints that would be statistically meaningless as an "early warning indicator."

5. ***What sorts of warranty information should be reported (e.g., make, model, model year, component)?***

Response: Please see the answer to question no. 1 above.

6. ***Are there warranty codes common to the motor vehicle industry? Passenger car industry? Heavy truck industry? Motor home industry? Child seat industry? Etc.?***

Response: No, not among Alliance members.

7. ***Should we require warranty data to be submitted using standardized codes? If so, what level of standardization would be appropriate?***

Response: No. Manufacturers should retain their existing coding systems. However, to facilitate analyses and to ensure that codings are not needlessly subdivided, standardized aggregate claims categories should be established. For example, a system could be established for aggregating all warranty claims received involving a "braking system" as the Alliance has defined that term (see Attachment 3), into a single category, "brakes", or into a few discrete subcategories, e.g., "brake fade". NHTSA should be mindful of the fact that a more specific set of subcategories will impose more burdens on manufacturers to code, sort, and collate the responsive reports. On the other hand, if the categories are more general (e.g., all braking system claims), NHTSA will have to specify a high threshold to screen out the large number of non-safety-related claims (such as brake squeal).

8. ***In what form should we require warranty information to be submitted?***

Response: Reporting should take the form of a standardized format providing the number of responsive claims. Attachment 3.1 to these comments provides a sample of the reporting format suggested by the Alliance. The Alliance believes that the early warning system ultimately established should provide data to NHTSA which will allow it to determine whether to open an investigation into a potential safety related defect earlier than it might otherwise be able. The format recommended by the Alliance is consistent with and serves this goal well.

1. What information should be provided about lawsuits?

Response: The Alliance has defined the term "claim" to include lawsuits. That definition is as follows:

> *A claim or incident involving serious injury or death* is any written demand, complaint, subrogation request or lawsuit received by a manufacturer from or on behalf of the person seriously or fatally injured that (a) involves " serious injury" , as further defined, or death, (b) alleges that a product defect was, at least in part, a contributing cause of the serious or fatal injury, and (c) contains sufficient information to identify the motor vehicle or item of motor vehicle equipment involved.
>
> *A claim for property damage* is any written demand, complaint, subrogation request, or lawsuit received by a manufacturer from or on behalf of the person who suffers the property damage, including a person' s insurer, that (a) alleges property damage as a result of a crash, tire failure, or fire, (b) alleges that a product defect was, at least in part, a contributing cause of the property damage, and (c) contains sufficient information to identify the motor vehicle or item of motor vehicle equipment involved.

The Alliance proposal contemplates providing NHTSA with the number of serious injuries, fatalities and property damage claims, including those received in the form of lawsuits. The Alliance does not believe that any other lawsuit information should be provided on a routine basis.

The burden of tracking and updating information as it develops through the course of litigation is enormous, and is not outweighed by the very limited value of the information that would be provided by such updates. For one thing, lawsuits have little to no value as an "early warning" tool. Lawsuits typically lag the introduction of the product by several years. The allegations made at the time of filing are so generalized that frequently no useful information may be gleaned from them about the nature of the plaintiff's theory of defect. The plaintiff's theory of defect often changes over time. For example, a plaintiff might allege a restraint defect, but later drop that claim in favor of a roof crush defect theory, which is later dropped in favor of a generic rollover propensity defect theory. Even when lawsuit information reveals that a person was seriously injured, it will rarely assist NHTSA in tracing that injury to a particular safety-related defect. The Alliance recognizes that serious injuries are required to be reported under TREAD; however, this requirement should be implemented in a manner that is capable of being managed administratively, and should not impose excessive burdens, especially in light of the limited value and lateness of the information.

2. Should information be provided about each lawsuit involving an alleged defect?

Response: No. Only those lawsuits alleging that a defect caused a serious injury, fatality, or property damage should be included in the early warning system. See response to question 1, above.

3. ***If not, what threshold would be appropriate? Should there be different thresholds based on the component or system involved?***

Response: With respect to lawsuits alleging that a serious injury or fatality was caused by a defect, each such allegation should be counted and reported in the early warning system. With respect to lawsuits alleging property damage, see further discussion in Attachment 5-7 about the appropriate thresholds for property damage claims.

1. ***Should information about design changes be provided? If so, should all changes be covered or just or only those relating to specified components or systems important to vehicle safety? If so, which components or systems?***

Response: The number of design changes generated in a year by just three Alliance members exceeds 500,000. These changes are recorded in drawings and other documentation that is inherently unique in format and content and cannot be standardized or reported in spreadsheet, electronically searchable form. Moreover, the vast majority of the changes made have no relationship to motor vehicle safety. NHTSA's notice observes that motor vehicles have some 14,000 parts and components. With roughly 300 carlines sold in the US alone, there would be over 4,000,000 changes reported to NHTSA per year, if each component had only one change in that year. And, design changes are typically documented on oversize blueprint form, which is expensive to copy and bulky to store. Finally, design changes may be documented in a language other than English, which would be burdensome to translate. As this information is unlikely to assist the Agency in identifying possible defect trends sooner, this information should not be part of the early warning system. Of course, NHTSA can obtain change notices as part of any specific defect investigation, where the change notices pertinent to a specific component in a specific make/model can be retrieved.

In this section of the ANPRM, NHTSA also suggested the possibility of requiring manufacturers to provide NHTSA with a dealer password so that the agency can access internal websites of manufacturers. This suggestion reflects a misunderstanding of information available to dealers on the manufacturers' websites. Design change documentation is not ordinarily available to dealers through the manufacturers' website except in those cases where it published in a technical service bulletin that is already provided to NHTSA under 49 CFR Part 573.8. Other service part changes are provided to dealers in parts catalogues that are already available to the public and NHTSA. Moreover, manufacturer's internal design change documentation is considered confidential business information, which NHTSA has recognized by granting categorical protection from disclosure under Part 512 (Appendix B, Category 1). Even if design change documentation were available through a secure website, providing NHTSA with a password for accessing that website would enable the agency to download confidential business information without the manufacturer's knowledge. This would result in NHTSA's access to confidential business information without enabling the manufacturer to assert pursuant to Part 512 that the information is confidential. The Alliance thus opposes providing the Agency with website access to confidential information.

2. ***Should different considerations apply to prospective-only running changes than to changes to service parts?***

Response: Please see the answer to question no. 1 above.

1. ***What systems for characterizing the seriousness of injuries are used in countries other than the United States? How do they relate to the AIS system?***

Response: The AIS system is the most widely accepted and used system in scientific circles.

2. ***Are the AIS3 "serious" criteria appropriate as indicia of "serious injury"? If not, what criteria are appropriate?***

Response: The AIS system is not an appropriate system for identifying "serious injuries" for purposes of the TREAD early warning system. The AIS system was developed to be an evaluation of "threat to life." However, it is a system that requires significant training and interpretation to be applied properly. For example, both a liver injury and a femur injury can be categorized as AIS 3, yet they may not be equally serious. An injured arm can be either an AIS 2 or an AIS 3, depending if the blood loss is less than 20% or greater than 20%; blood loss evaluation can be very subjective. Even trained medical personnel are required to take an AAAM sponsored course before performing AIS coding.

To illustrate the difficulties, assume a vehicle occupant cuts his arm in a crash (no fracture, just soft tissue injury). In order to classify the AIS level of the cut, one would refer to page 53 of the AIS coding book, the upper extremity injuries chapter. The coder must determine next if there is an injury to the "whole area", "vessels", "nerves", "muscles, tendons, ligaments", "skeleton joints" or "skeleton bones". If the cut is "whole area," the injury is next subclassified. As can be seen on page 53 of the AIS coding book, in order to classify just a soft tissue injury to the upper extremity ("cut arm"), a person must know the difference between a crush injury, degloving injury, penetrating injury, avulsion, laceration, abrasion, and contusion. They must further be able to decide if the wound extends into the subcutaneous tissue or not. Once they manage to do that, they need to be able to estimate the body surface area in square centimeters of the injured area. They must also be able determine the percentage of blood loss as a proportion of body weight of the injured person.

This is example is just for a cut arm. The coding challenges are compounded in the case of complex body areas like the brain or the eye and in the case of multiple injuries? It is unlikely that a claim or lawsuit will contain enough information to permit making these kinds of complex assessments, or that the personnel reviewing these claims and lawsuits will have the training necessary to apply the AIS system to the information available about the injury.

Each year in the US alone, there are roughly 6.3 million police reported crashes – 2.7 million of which require vehicles to be towed from the scene. These crashes produce some 42,000 fatal injuries and 3,200,000 non-fatal injuries a year. The Alliance has not been able to quantify how many of these crashes generate claims or other communications between manufacturers and vehicle owners or their representatives. The Alliance understands that of the 3.2 million non-fatal injuries occurring each year, roughly 800,000 of these are of a severity of AIS 2 or greater and that 115,000 are of a severity of AIS 3 or greater. The large volume of these injuries, some number of which will result in claims or other communications with manufacturers, necessitates a definition of "serious injury" easily understood by laypersons, or an appropriate surrogate for a definition, such as a claim alleging an injury resulting in overnight admission to a hospital. As injury claims are often nonspecific, NHTSA should understand that some manufacturers might simply opt to report all claims alleging injury regardless of severity.

The Alliance recommends that the term "serious injury" be defined as follows:

> Serious Injury means any non-fatal injury resulting in an overnight hospital admission (but not including emergency room treatment if the person was treated and released).

While this definition is imperfect, in that it will pick up some injuries that are not in fact serious, it is not likely to overlook any injuries that are serious.

3. ***How shall it be determined whether a claim pertaining to an injury pertains to a serious injury? What assumptions should be made?***

Response: Please see the answer to question no. 2 above. Briefly, the Alliance recommends that the term "serious injury" be defined to mean any non-fatal injury resulting in an overnight hospital admission, but which does not include emergency room treatment if the person was treated and released.

If an initial claim does not allege a "serious" injury, should the manufacturer be required to report the claim later if it learns that the injury was serious or alleged to be serious?

Reponse: No. The determination of whether an injury is "serious" should be made on the basis of the information contained in the complaint itself. The burden of tracking and updating information as it develops through the course of litigation is enormous, and is not outweighed by the very limited value of the information that would be provided by such updates. For one thing, lawsuits have little to no value as an "early warning" tool. Lawsuits typically lag the introduction of the product by several years. The allegations made at the time of filing are so generalized that frequently no useful information may be gleaned from them about the nature of the plaintiff's theory of defect (although it should be easy to tell if the plaintiff has alleged that he was hospitalized overnight). The plaintiff's theory of defect often changes over time. For example, a plaintiff might allege a restraint defect, but later drop that claim in favor of a roof crush defect theory, which is later dropped in favor of a generic rollover propensity defect theory. Even when lawsuit information reveals that a person was seriously injured, it will rarely assist NHTSA in tracing that injury to a particular safety-related defect. The Alliance recognizes that serious injuries are required to be reported under TREAD; however, this requirement should be implemented in a manner that is capable of being managed administratively, and should not impose excessive burdens, especially in light of the limited value and lateness of the information.

4. ***Would manufacturers find it less burdensome to report to NHTSA all allegations of injury caused by a product defect?***

Response: If NHTSA does not adopt a simple definition of "serious injury" that can be applied by a layperson and that is administratively manageable, it may be easier to report to NHTSA any allegation of injury that is alleged to have been caused by a defect. However, such a broad over-reporting of injuries is inconsistent with the TREAD Act, and risks resulting a system so large that it will mask the injuries that might warrant follow-up by NHTSA. NHTSA should try to adopt a workable definition of "serious injury," as discussed in response to question 3, above.

5. ***How and to which office of a manufacturer are deaths and serious injuries reported? Is the answer different with respect to incidents that occur in foreign countries?***

Response: Individual Alliance member submissions to the docket may address this issue.

1. ***What data should manufacturers include as "aggregate statistical data"?***

Response: Reporting of claims and other information should be on a make, model, and model year basis. Non-injury claims data should be normalized on the basis of total production or total sales. Injury claims and claims alleging fire or rollover should be reported by the number of claims received in a reporting period. The Alliance recommended reporting format is contained in Attachment 3.1.

2. ***What type of statistical data relating to property damage (including fire and corrosion) do manufacturers maintain? What corporate office is responsible for their maintenance? Is the answer different with respect to incidents and claims in foreign countries?***

Response: Individual Alliance member submissions to the docket may address this issue.

3. ***How is this data maintained by manufacturers? How is it used?***

Response: Individual Alliance member submissions to the docket may address this issue.

4. ***How should this data be submitted to NHTSA to best provide an early warning of potential safety defects?***

Response: Please see the response to question no. 1 above.

1. ***Should a manufacturer be required to report information on active investigations that it has initiated with respect to potential defects in its vehicles or equipment? How, if at all, should it be determined that these are safety related? What is the extent to which this information should be reported?***

Response: The Alliance has been unable to develop a definition of "internal investigation" that is suitable for an industry-wide early warning reporting system. So many routine business practices could be perceived as "internal investigations" that reporting all of these activities would not be useful as an early warning system. For example, the activity of reviewing and analyzing field performance information (such as field reports) on a regular basis is an "internal investigation" that occurs routinely at most companies. Again, this sort of activity is not uncommon in manufacturing industries, but could not reasonably be captured and reported in an early warning system.

Manufacturers in the ordinary course of business continuously monitor many aspects of product development, assembly and in-use performance making it impossible to define exactly when an internal investigation begins or ends. There is just no way to write an objective definition that captures the precise point at which routine analyses of field performance data or routine monitoring of manufacturing quality issues becomes the sort of "internal investigation" discussed in the ANPRM. At most companies, the process – which in detail is specific to individual vehicle manufacturers – involves incrementally increasing levels of scrutiny and analysis of various information. Sometimes the issue is resolved with a safety recall or customer satisfaction campaign. Other times it is determined that no further action is required other than to keep monitoring information that is continually received.

In any event, the information reviewed by manufacturers in evaluating product performance is largely the same data that the Alliance recommends be counted for inclusion in the TREAD early warning system and reported to the Agency as trend data, such as field reports and, for some manufacturers, dealer reports. Even if it were possible to objectively define "internal investigation," the simple fact that a manufacturer would have initiated one would not assist the Agency in identifying potential safety-related defects faster than it could by following up on the trend data it will already be receiving.

Further still, 80% of recalls are initiated by manufacturers without any NHTSA influence. NHTSA should be loath to do anything to interfere with the efficient functioning of a manufacturer's effective processes. Actions by NHTSA to intrude on these successful processes risks unintended consequences that could reduce effectiveness.

2. ***What is an appropriate definition of an internal investigation that should be reported to NHTSA?***

Response: Please see the answer to question no. 1 above.

3. ***Should manufacturers be required to report such investigations as soon as they are commenced? If not, at what point should the investigation be reported to NHTSA?***

Response: Please see the answer to question no. 1 above.

1. ***Should "customer satisfaction campaigns," "consumer advisories," "recalls" or "other activities involving the repair of motor vehicles or motor vehicle equipment" be defined in NHTSA's regulation, and, if so, what would be an appropriate definition for each of these terms?***

Response: Yes. The Alliance recommends the following definition be adopted.

> *Customer satisfaction campaigns, consumer advisories, recalls, or other activity involving the repair or replacement of motor vehicles or items of motor vehicle equipment* shall mean those actions, other than foreign recalls or other safety campaigns as further defined, undertaken or authorized by a manufacturer in which a class of affected owners of motor vehicles or items of motor vehicle equipment are notified of an offer to repair or replace the vehicle or equipment or to extend any applicable vehicle or equipment warranty.

2. ***How many and what kind of customer satisfaction campaigns, consumer advisories, recalls, or other activity involving repairs have occurred since January 1, 1998, that were not required to be reported to NHTSA under 49 CFR 573.8? Indicate whether these occurred in the United States or foreign countries. Please submit a copy of all communications provided to consumers or dealers with respect to each such campaign, advisory, recall, or other activity.***

Response: The Alliance does not have responsive information; however, it is the Alliance's understanding that numerous reports of foreign safety recalls have been recently reported to NHTSA pursuant to the Alliance commitment to do so, which was later incorporated into TREAD.

1. ***Is the word "identical" understood internationally, or do we need to define it? If so, how?***

Response: The term "identical" is understood and does not have to be defined for the purposes of this rulemaking.

2. ***How should a manufacturer determine if a vehicle sold in a foreign country is "substantially similar" to vehicles sold in the United States? Is it enough that the vehicles share the same platform and/or engine family? If not, why not?***

Response: To further ensure that the requirements adopted are objective, NHTSA should develop a process and guidelines for identifying "substantially similar" vehicles for the purposes of the early warning system. In the ANPRM, NHTSA noted that the concept of "substantially similar" motor vehicles already exists in the Vehicle Safety Act. and is used as one basis for evaluating whether a foreign vehicle is eligible for importation into the United States, the so-called "gray market" program. The Alliance believes that the "gray market" program provides a useful starting point for developing a process of identifying "substantially similar" vehicles. Under the "gray market" process, NHTSA develops and publishes a list of vehicles that have been determined to be "substantially similar" to U.S. certified vehicles. The Alliance believes that a similar process would be appropriate here. The Alliance proposes that each vehicle manufacturer be required to submit to NHTSA annually, at the beginning of each model year a listing of those vehicles that the manufacturer intends to sell in countries other than the US and that the manufacturer has determined are "substantially similar" to a vehicle certified for sale in the United States. To aid manufacturers in identifying "substantially similar" models, NHTSA should publish as part of its final rule, criteria for identifying such models. The Alliance recommends the following cumulative criteria for identifying "substantially similar" vehicles:

- Same platform and body shell;
- Same engine family;
- Same engine displacement;
- Compliance or "substantial compliance" with specified FMVSS requirements, such as S105/135, 203/204, 208 (except the automatic protection provisions), 209, 214, and 301.

A vehicle meeting the above criteria would be considered "substantially similar", unless the manufacturer could otherwise demonstrate that it, in fact, is not based on some other unique characteristics. NHTSA would review manufacturers' annual submissions and work with the manufacturer to resolve any questions or concerns about the list before publishing the list as the final list for that model year. Vehicles introduced into commerce after the beginning of a model year could be reviewed during the course of the year as a supplement to the annual list. If NHTSA thought it useful, it could publish the list for public comment before accepting the list as final. The advantage of this pre-model year review process is to ensure that any concerns about whether a vehicle belongs on the list would be reviewed before the model year begins, to avoid any need to seek TREAD-reportable data about that vehicle retroactively, if it is determined that a "substantially similar" vehicle should have been included.

The Alliance does not support any requirement to track and report on incidents in foreign countries involving components that are identical or substantially similar to those used on vehicles in the United States but are installed on vehicles that have ***no*** U.S. counterpart. In other words, if a manufacturer uses a braking system on one model in the United States that is substantially similar to the braking system used on a foreign vehicle that is ***not*** substantially similar to the U.S. model, the Alliance opposes any requirement to track incidents involving that braking system on the foreign model. The Alliance member data systems are not set up to track and collect data in foreign countries on the basis of the similarity of the components to those used in the United States. While it will difficult enough to collect reportable data from other countries involving substantially similar ***vehicles***, the Alliance members believe that such a system is only workable if there is a definitive list of substantially similar vehicles established for each model year. It is not feasible, however, to implement such a system at the component level that is capable of being managed reasonably, particularly in foreign countries.

Moreover, information regarding substantially similar or even identical components in different vehicles would be of very little value to NHTSA. Specifically, vehicle components are designed to interact with each other and do so in different ways from vehicle to vehicle. For example, as provided above, certain high load operation conditions that a pick-up truck experiences may cause the transmission fluid temperature to exceed the melting point of materials used in the connector that connects the fluid line to the transmission. The same fluid may never experience such a problem when used in a passenger car that never generates the same high load, high temperature operation as the truck. When NHTSA takes into account that these types of differences may occur in the over the tens of thousands of parts and components in a vehicle when compared to different vehicles, both the burden of tracking and the lack of value from this information makes apparent the lack of need to track substantially similar or even identical components between differing vehicles. Valuable safety related information will be captured in any event through the reporting of information related to identical and substantially similar vehicles. Because such information is already captured and because of the lack of additional benefit in the face of the overwhelming burden to manufactures to collect component information on differing vehicles, the Alliance does not support the tracking of such components. Instead, NHTSA should limit such tracking and reporting to identical and substantially similar vehicles as outlined in greater detail in this comment.

Attachment 3.2 to these comments contains a sample of the annual submission recommended by the Alliance.

3. ***How should "substantially similar" motor vehicle equipment be defined? Would the definition be different with respect to individual parts, component parts, assemblies and systems? Other than tires and off-vehicle equipment (such as child seats), should the definition be restricted to replacement equipment for substantially similar motor vehicles?***

Response: The Alliance does not support separate tracking and reporting of "substantially similar" equipment installed as original equipment on a motor vehicle, because such reporting would immensely increase the complexity of the reporting system, while producing data that would be confounded by the fact that it would combine reports of incidents involving equipment that is experiencing very different operating environments.

The Alliance is neutral on the question of how to define "substantially similar" equipment for purposes of obtaining reports from manufacturers of replacement and aftermarket equipment.

1. ***What is an appropriate definition for "field report"?***

Response: The Alliance recommends the following definitions.

Field Report mean a (a) non-privileged technical report prepared by a manufacturer' s technical staff involving (b) a single incident in the field or several similar incidents in the field, (c) a covered vehicle system, and (d) a vehicle (or vehicles) that has been sold to a purchaser for purposes other than resale.

Dealer Report means (a) a non-privileged technical report prepared by the authorized technical staff of a manufacturer' s franchised dealer involving (b) a single incident in the field or several similar incidents in the field, (c) a covered vehicle system, and (d) a vehicle (or vehicles) that has been sold to a purchaser for purposes other than resale, but does not include a report of a customer complaint that is passed through to the manufacturer without any technical analysis.

Covered Vehicle System means (a) a braking system, fuel system, restraint system, or steering system incorporated into a covered vehicle, (b) axle, suspension or brake components on heavy trucks and trailers, or (c) motor vehicle tires.

2. ***In the context of field reports for which information is to be provided, should there be a list of systems, parts, and components that are safety related? Should it be the same as the list for warranty claims and other claims?***

Response: Yes, NHTSA should implement an early warning system by adopting a system focused on those systems that are "safety critical." In other words, it should focus on those systems which are requisite for safe operation, and which have historically been involved in the largest number of recalls and those systems where the potential risk to safety is significant. The Alliance believes that, in addition to tires and child restraints, implementation of an early warning system should initially focus on the following systems: braking systems, fuel systems, restraint systems, and steering systems on all motor vehicles and axle/suspension systems on heavy trucks and trailers. These categories were identified by NHTSA in the ANPRM as a possible starting point for the early warning system, and the Alliance believes that these systems identify the appropriate scope of the early warning information collection system. The scope and content can be reviewed, however, as the Agency gains experience with this system. For purposes of these comments, the Alliance will refer to the "four covered vehicle systems" to mean braking systems, fuel system, restraint systems and steering systems, because those are the ones that would be tracked and reported by Alliance members. The Alliance expects that NHTSA would establish similar requirements for reporting by heavy duty vehicle manufacturers that might include these four systems, plus axle/suspension systems, and requirements for tire and child restraint manufacturers that would include their products. Any reference to "four covered vehicle systems" in these comments is not intended to suggest that these other systems would not be included in the early warning system.

The Alliance believes that field reports and dealer reports can be potentially useful for early warning purposes. Thus, identification of these reports is appropriately included in an early warning reporting system. To be useful as an early warning of possible safety defects, however, a field report or dealer report must be a ***technical*** report about an incident (or several similar incidents) and not merely a report serving as a conduit for an unverified consumer complaint. Moreover, to be useful, the field report or dealer report should address a possible malfunction of the vehicle system at issue and should not include research reports or accident reconstruction reports prepared for local police departments. Beyond these universal points, however, Alliance member companies differ in their systems for obtaining technical information from the field. Some companies rely very little on technical reports generated by their dealers, preferring instead to have field incidents reviewed by a member of the company's staff or other technical representative. Other companies receive and review large quantities of reports from their dealers containing some technical information about field incidents. While many of these dealer reports are not detailed enough to be useful as an early warning, some are.

While the Alliance proposal includes reports of information about both types of reports, the Alliance proposes adopting separate definitions of "field report" and "dealer report." (See text of proposed definitions in Attachment 1.) A separate definition allows the distinction to be drawn between a report generated by a manufacturer's technical employee, who will usually be knowledgeable about the vehicle system at issue, and a dealer's technical employee, who may have less information about the design and manufacturing history of the vehicle system at issue.

Also separate definitions allow NHTSA to specify, with respect to dealer reports, that they do not include the category of reports that merely transmits an unverified customer complaint without any technical analysis. Because different companies make different uses of "field reports" and "dealer reports," NHTSA can not expect to compare one company's "field report" experience with another company's, especially if the second company is one that is more reliant on data from "dealer reports" than is the first company.

Because of the sheer volume of field reports and dealer reports generated each year, and the difficulty of translating them from foreign languages, the Alliance proposes that manufacturers should not provide NHTSA with copies of the field reports and dealer reports themselves, but instead provide NHTSA with a combined count of all field reports and dealer reports received by the manufacturer in a reporting quarter that involve one of the 4 covered systems incorporated into a covered vehicle sold or leased in the territorial US or an international reporting region that the Alliance recommends be established for tracking field reports and dealer reports.

Motor vehicles are marketed in at least 140 countries around the world. Attachment 2 to these comments lists these countries, the number of vehicles registered by country, and the percentage of vehicles registered in that country as compared to total number of vehicles registered worldwide. A cursory review of this attachment indicates that as of 1998, there were roughly 663 million vehicles registered worldwide, 32% of which – roughly 212 million – are registered in the United States and its territories. The pre-TREAD Safety Act covered these regions.

Establishment of an "international reporting region" comprised of Canada, Mexico, Germany, the United Kingdom, Japan and Australia would expand the number of vehicles for which field reports and dealer reports would be monitored by over 178 million units. Under this structure, nearly 60% of the world's vehicle population would be covered by field reports and dealer reports identified in the early warning system.

Creation of this reporting region for field reports and dealer reports will balance the need to identify potentially useful information for NHTSA with the serious concerns about the feasibility of tracking detailed technical information from smaller countries. With the exception of Australia, the countries proposed to be included in the reporting region are among the top auto-producing nations of the world, thereby ensuring the availability of sufficient expert technical assets in each. Furthermore, most of the countries included also have organized motor vehicle recall systems in place ensuring that manufacturers operating in these countries have systems already in place to track the field performance of vehicles under a regulatory regime. Each of these factors helps to achieve the objective of obtaining useful, meaningful, and relevant information for NHTSA in a timely way that can be efficiently managed by the reporting manufacturers.

The proposed countries also represent a wide range of operating conditions and environment. Climatic conditions range from desert to arid to tropical to temperate to Arctic. Elevation extremes of the proposed regions range from 86 meters below sea level to 6,194 meters above. Prior to TREAD, vehicles subject to the Safety Act operated over roughly 6,400,000 kilometers of paved and unpaved roads. Adoption of the reporting region proposed here for field reports and dealer reports would increase by 68% -- to nearly 11 million kilometers – the roads over which the monitored vehicle population would operate.

3. ***Do manufacturers screen field reports for safety-related information? If so, what are their systems and how do they work?***

Response: Individual Alliance member comments to the docket may address this issue.

4. ***How do manufacturers process and maintain field reports? Is all information entered into computers?***

Response: Individual Alliance member comments to the docket may address this issue.

5. ***What information regarding field reports should be provided NHTSA? Should there be a numerical or rate threshold before field reports must be provided?***

Response: Please see the answer to question no. 2 above.

1. ***Should reporting frequency vary depending on the type of information (e.g., deaths, injuries, warranty rates, complaints, etc.)? If so, what is an appropriate frequency for each type?***

Response: Most reporting should take place quarterly. The data contained in the Alliance proposal involves the distillation of a vast amount of information into a usable report. Quarterly reporting is feasible, helps manage the burden on the manufacturers that would be higher with more frequent reporting, and provides information in a prompt fashion to NHTSA.

The Alliance recommendation for a particular reporting format for its recommended reporting scheme is contained in Attachment 3.1. The two exceptions to this frequency should be foreign safety recalls (which the statute requires to be reported within five business days) and foreign customer satisfaction campaigns and similar customer communications, which the Alliance recommends be reported monthly, along with other material provided under Section 573.8.

2. ***Should reporting frequency vary depending on the type of vehicle or equipment (e.g., passenger car, bus, child seats or other equipment)? If so, what is an appropriate frequency for each type?***

Response: Please see the answer to question no. 1 above.

3. ***Should reporting frequency vary depending upon the component or system involved (e.g., air bag, child restraint, seat belt assemblies, brakes)? If so, what is an appropriate frequency for each?***

Response: Please see the answer to question no. 1 above.

4. ***Should manufacturers of particular equipment, such as off-vehicle and accessory equipment, be required to report data on a periodic basis, or only if they receive certain information such as claims alleging deaths or serious injuries involving their products?***

Response: The Alliance is neutral with respect to the frequency of reporting by off-vehicle or accessory equipment manufacturers.

1. ***How would manufacturers prefer to report information to us (e.g., hard copy, electronically)? If both, what would be in hard copy? What would be in electronic format? Which electronic format(s) would be preferable?***

Response: The Alliance has developed a recommended reporting format for the early warning reporting scheme it has developed. A sample of this report is contained in Attachment 3.1 to these comments. The Alliance recommends that this report be submitted to the Agency electronically to facilitate analyses. With the exception of reports of foreign safety recalls and foreign customer satisfaction campaigns (and similar activity), the Alliance does not support the submission of copies of information at the early warning stage.

2. ***Should information regarding deaths and serious injuries be submitted in the form in which it is received by the manufacturer, the form in which it is entered into a database by the manufacturer, or in some other way?***

Response: Please see the answer to question no. 1 above.

The following five questions relate to the possible use of a spreadsheet for reporting aggregate information.

1. ***What do manufacturers understand the term "aggregate statistical information" to mean?***

Response: The Alliance understands the term "aggregate statistical information" in the TREAD Act to mean that Congress did not expect NHTSA to track all warranty claims or property damage claims, in contrast to claims involving serious injuries and fatalities, all of which are to be reported to NHTSA if they are alleged to have been caused by a defect. The Alliance believes that designing the early warning system to monitor trends in the covered vehicle systems in vehicles sold in the United States, along with establishing reporting thresholds and limiting the reports to the count of responsive claims satisfies the Congressional direction to collect "aggregate statistical data" on property damage claims. The Alliance recommended reporting format is contained in Attachment 3.1.

2. ***Is aggregate statistical information regarding claims, deaths and injuries likely to be useful in identifying potential safety-related defects? Would it be too general to be useful?***

Response: Warranty claims and property damage claims standing alone are not likely to be useful in identifying safety-related defects. Please see the answer to question no. 1 immediately above.

3. ***Would this type of aggregate statistical information tend to result in a large number of investigations into issues that are not related to potential safety-related defects?***

Response: If NHTSA were to use the reports of warranty claims or property damage claims alone as a basis on which to open a defect investigation, there is a substantial risk that NHTSA will pursue a large number of leads that are not related to potential safety defects. The Alliance proposal to limit the tracking to the covered vehicle systems will help reduce this risk, but will not eliminate it. Therefore, NHTSA should not rely on these indicators alone in deciding whether to open an investigation, but should consult these two indicators when other, more reliable data sources, such as an increasing number of field reports on a particular covered vehicle system, suggest the possibility of a safety defect.

4. ***Would the submission of supplemental information beyond the aggregate statistical information be necessary or appropriate to provide NHTSA with sufficient information upon which to decide to open an investigation? What types of such information?***

Response: No. The Alliance has sought to construct a program that would identify information that may assist the Agency to identify data trends, so that the Agency could act through its established defects investigation process if the trends indicate a potential safety-related defect.

5. ***If NHTSA needs to submit requests for supplemental information, should the requests be made as part of an investigation? If not, why not? If not, how should NHTSA characterize these requests, and should the requests and responses be made available to the public?***

Response: Ordinarily, yes. The ANPRM stated that, historically, requests by the public for information submitted to the agency are addressed under the Freedom of Information Act. The Alliance supports this approach for the TREAD early warning reports. The Alliance does not support any automatic release of the early warning reports in the docket or the NHTSA web site, because these reports will contain information that is unproven and that could unfairly impugn the reputation of a product or a manufacturer. While the Alliance recognizes that information submitted under TREAD remains subject to disclosure under the Freedom of Information Act, if a properly drafted request is filed and the information sought is not otherwise confidential under The ANPRM stated that, historically, requests by the public for information submitted to the agency are addressed under the Freedom of Information Act. The Alliance supports this approach for the TREAD early warning reports. The Alliance also believes that the provision of TREAD addressing disclosure, Section 30166(m)(4)(C), was included to ensure that the disclosure of nonconfidential information in the early warning reports would be made only pursuant to a proper FOIA request, and would not be disclosed pursuant to any presumption of disclosure that is greater than that contained in FOIA.

1. ***How should NHTSA review and utilize the information to be submitted under the early warning rule?***

Response: Under the TREAD Act, NHTSA cannot compel the reporting of information unless it will "assist in the identification of defects related to motor vehicle safety." Therefore, NHTSA must institute systems and processes that will make effective use for the mandated purposes of the information that the manufacturers are required to submit. The TREAD Act authorized NHTSA to obtain a substantial amount of information from vehicle and equipment manufacturers and from domestic and foreign sources, but only to the extent the agency can make the required showing that the mandated information will "assist in the identification of defects related to motor vehicle safety." This provision is a substantive limitation on NHTSA's new information gathering powers, and therefore one that cannot be made absent notice and an opportunity for public comment on the agency's tentative conclusions. For this reason, the Alliance submits that NHTSA should explain, as part of its forthcoming Notice of Proposed Rulemaking, how it will review and use any information it proposes to require "to assist in the identification of defects related to motor vehicle safety," and allow public comment on that explanation.

Once NHTSA determines that an early warning indicator should result in the opening of a defect investigation, it should conduct its reviews in close cooperation with the manufacturer in order to assure that appropriate action is taken consistent with the information revealed by the early warning process.

2. ***What system or processes should NHTSA utilize in reviewing this information?***

Response: This is something that only NIITSA is in a position to answer.

1. ***What are the estimated startup and ongoing costs (including financial as well as manpower costs) of complying with the early warning reporting requirements discussed in this notice? What is the basis for the estimate?***

Response: The Alliance is not able at this time to quantify or even estimate start-up costs. There is no doubt that these will be substantial. These costs will be further determined by the extent of the foreign reporting obligation defined in the final rule.

2. ***How should NHTSA decide whether particular requirements are "unduly" burdensome? Should we balance the burdens against the anticipated benefits of receiving the information in question? If so, how should we perform that balancing?***

Response: NHTSA must not forget the express purpose of TREAD, namely, to gather information that may assist in the identification of safety-related defects. Anything beyond this exceeds the purpose of TREAD. In addition, NHTSA must assess the suitability of the information required to be automatically reported to actually perform an effective early warning function. Where such information is not reasonably calculated to perform such a function, NHTSA should request it only on a case-by-case basis as needed in the context of a specific defect investigation.

3. ***What is the most effective early warning information and least burdensome ways of providing it?***

Response: The most effective information received by a manufacturer is that compiled in detail by those with the requisite training, technical expertise and experience to assess product performance in actual use. Information compiled by others for purposes other than the actual assessment of product performance and behavior is not by itself an effective early warning indicator.

The most effective and least burdensome way of providing such information would be in a standardized electronic format such as that recommended by the Alliance (see Attachment 3.1).

4. ***Have manufacturers developed or are manufacturers beginning to develop and implement their own early warning reporting procedures in advance of NHTSA's rulemaking? If so, what are these procedures? How do these procedures differ from those discussed in the ANPRM? How are they similar?***

Response: The Alliance proposal contains the elements of an early warning system; however, individual manufacturers are unlikely to engage in extensive reorganizations of their data systems until the requirements of the final "early warning" rule are known.

International and Domestic Legal Constraints On the Extraterritorial Application Of NHTSA Regulations Under the TREAD Act

I. Introduction

The "Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, signed it into law on November 1, 2000,[1] requires motor vehicle and equipment manufacturers to report to the National Highway and Traffic Safety Administration (NHTSA) on **defects occurring in foreign countries** on motor vehicles or equipment identical or substantially similar to vehicles or equipment offered for sale in the United States.[2] In addition, the Act also directs NHTSA to publish a rule requiring motor vehicle equipment manufacturers to report other information ("early warning reporting requirements") derived from **foreign** and domestic sources that may assist in the identification of defects related to motor vehicle safety in motor vehicles and motor vehicle equipment in the United States.[3] Such other information includes warranty and claims data (e.g. injury and death claims, customer satisfaction campaigns, consumer advisories, etc.), any other data that might assist in identifying defects, and accident data involving possible or alleged defects. The act also sets forth both civil and criminal penalties for certain violations relating to the information reporting requirements of the act.

NHTSA is currently in the beginning stages of a rulemaking process to implement this act and is gathering input from the public. The final rule is due June 30, 2002. The amount of information from overseas potentially subject to reporting under a final NHTSA rule is enormous and could require manufacturers to report data from every country in the world in which they sell. This would clearly impose a significant burden on manufacturers, particularly foreign-based manufacturers who sell most of their production outside the United States

Historically, vehicle manufacturers have generally cooperated with NHTSA in providing relevant information involving overseas activities. However, passage of the TREAD Act, which contains a number of provisions relating to the gathering and reporting of information from persons overseas on activities overseas, creates a whole new body of law and potential regulation in this area. This new body of law also includes civil and criminal penalties associated with a failure to comply with eventual NHTSA regulations implementing the act. As NHTSA moves forward with its rulemaking process to implement the TREAD Act, the agency needs to be aware of, and should take into careful consideration, possible international and domestic legal constraints on the promulgation of extraterritorial regulations. NHTSA should also be sensitive to the sovereignty concerns of other countries regarding any U.S. attempt to regulate economic activity outside the United States.

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[1] Transportation Recall Enhancement, Accountability, and Documentation Act, Pub. L. 106-414 (2000).
[2] Id., Sec. 3(a)(1)
[3] Id., Sec. 3(b).

Although the TREAD Act was clearly intended by the Congress to apply extraterritorially, NHTSA has been given considerable administrative discretion under the act with respect to the implementation of certain key elements of the act (particularly the "early warning reporting requirements"). NHTSA therefore has the flexibility to craft its regulations in such a way that carries out Congressional intent while at the same time minimizing potential conflicts with both international and domestic law regarding the extraterritorial application of U.S. regulations.

As will be discussed below, the key to avoiding such conflicts is for NHTSA to pursue a course of regulatory action with respect to extraterritorial application of its proposed regulations that is reasonable, restrained (particularly with respect to the potential application of criminal sanctions under the act to persons outside the United States) and sensitive to any concerns that might be raised by foreign countries during the regulatory process.

II. International Legal Constraints on the Extraterritorial Application of NHTSA Regulations

The TREAD Act establishes certain requirements for the gathering and reporting of information from persons overseas on overseas activities. A key question arising under international law that is of direct relevance to NHTSA's implementation of the TREAD Act is the extent to which there are limits on one country applying its law to persons or activities in another country.

A. Definition and Sources of International Law

The Third Restatement of the Law on the Foreign Relations Law of the United States (hereinafter the "Restatement") states that, "International law consists of those rules or principles which govern the relations and dealings of nations and international organizations with each other, as well as with some of their relations with persons, whether natural or juridical."

It is generally recognized that international law is derived from three principle sources:

1. Customary law, which results from a "general and consistent practice of states followed by them from a sense of legal obligation."[4]

2. International agreements, which "create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted."[5]

3. General principles that are common to the major legal systems of the world. Such principles, while perhaps not incorporated or reflected in customary law or international agreement, "may be invoked as supplementary rules of international law where appropriate." [6]

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[4] THE RESTATEMENT 3RD ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §102 (2), (1987).
[5] Id., §102(3).
[6] Id, §102(4).

B. Relationship of International Law to Domestic Law

Generally speaking, international law recognizes that every country has jurisdiction to prescribe its own law, to adjudicate cases in its courts or other tribunals, and to enforce its law.[7]

1. Jurisdiction to prescribe. To prescribe means to make a state's law applicable to the activities, relations, or status of persons in things, whether by legislation, executive act or order, by administrative rule or regulation, or by determination of a court.

2. Jurisdiction to adjudicate. To adjudicate means to subject persons or things to the process of its courts or administrative tribunals, whether in civil or criminal proceedings, and whether or not the state is a party to the proceedings.

3. Jurisdiction to enforce. To enforce means to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action.

A delicate web of consent and custom allows countries to navigate the application of international law such that prescription, adjudication, and enforcement of law by one country does not unduly impinge upon the sovereignty of another country. A limited body of case law has arisen in international venues that provide some indication of how the international community has come to understand and apply these principles. As a general matter, however, international law imposes limits on a country's ability to render its own law applicable to persons or activities outside its own borders. Moreover, a country does not have jurisdiction to enforce a rule of law unless it had jurisdiction to prescribe the rule in the first place.

C. Jurisdiction to Prescribe, the Effects Doctrine, and the Limits to Extraterritorial Jurisdiction

There are a number of generally recognized bases for exercising jurisdiction to prescribe under international law. Three such bases are: 1) the principle of territoriality; 2) the principle of nationality; and 3) the effects doctrine.[8] The principle of territoriality allows a country to prescribe laws within its own borders. The principle of nationality permits a country to prescribe laws applicable to all its persons who are nationals, regardless of their physical location. The effects doctrine (also known as the "objective territorial" principle) is most relevant to implementation of the TREAD Act. According to the effects doctrine, a country has the jurisdiction to prescribe law with respect to, among other things, **conduct outside its territory that has or is intended to have substantial effect** within its territory.

Whatever the basis of jurisdiction, the exercise of such jurisdiction must not be unreasonable.[9] The criteria for what constitutes unreasonableness may lead to different results according to the subject of the regulation. In this connection it should be noted that, while the United States has accepted the effects doctrine as an integral part of international law, some other countries are skeptical of and reluctant to embrace specifically this legal theory as an appropriate basis for asserting the jurisdiction to regulate economic activity outside a country's territory. This is especially true when the regulation is directed to a

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[7] Id., §401

[8] Pawel K Chudzicki, The European Union's Response to the Libertad Act and the Iran Libya Act: Extraterritoriality Without Boundaries?", 28 Loy. U. Chi. L.J. 505 (1997), *citing* Ulricus Huber, Praelectiones Juris Romani, Pars II (liber I tit. III) (4th ed. 1749).

[9] Id., §403(1).

broad international market and not specifically at the market of the regulating country. Thus, seen from abroad, unrestrained attempts by the United States to use the effects doctrine to apply its laws to economic activity overseas would, in effect, amount to an assertion of unilateral control over the global marketplace in defiance of the policies of other countries. Indeed, the use of the effects doctrine by the United States in this context has led to charges of U.S. economic imperialism and lack of respect for the sovereignty of other countries.

According to the Restatement, what constitutes an "unreasonable" exercise of jurisdiction to prescribe can depend on a variety of factors, including but not limited to:

- The extent to which the activity being regulated has a substantial, direct, and foreseeable effect upon the territory of the regulating state;
- The connections between the regulating state and the person principally responsible for the activity to be regulated;
- The character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- The existence of justified expectations that might be protected or hurt by the regulation;
- The importance of the regulation to the international political, legal, or economic system;
- The extent to which the regulation is consistent with traditions of the international system;
- The extent to which another state may have an interest in regulating the activity; and
- The likelihood of conflict with regulation by another state.[10]

The question of conflict arises if it is reasonable for more than one country to regulate the same activity. According to Section 403 (3) of the Restatement, when it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the relevant laws of the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction. A state should defer to the other state if that other state's interest is clearly greater.

D. Jurisdiction to Prescribe with Respect to Criminal Matters

The principles governing the jurisdiction to prescribe discussed above apply to criminal as well as to civil regulation. Thus, the principle of territoriality, the principle of nationality, and the effects doctrine all apply to criminal matters as well as to civil matters. In addition, international law recognizes other principles on which to assert criminal jurisdiction. These include the protective principle, based on the need to protect the security of the state or the integrity of its government; the universal principal, based on the state having physical custody of the offender; and the passive personality principle, based on the nationality of the victim. However, even when one of these bases for criminal jurisdiction is present, a state may not apply its criminal law to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

[10] Id., §403(2)(a-h).

Enforcement of criminal law looks to adjudication of the charges. Thus, if a state did not have jurisdiction to adjudicate with respect to a particular criminal matter (for example, because the activity did not take place or cause harm within its territory), the state may not use its criminal enforcement machinery against the accused person except to assist the law enforcement efforts of a state with the authority to adjudicate. In any event, any enforcement measures must be reasonable in the circumstances.

E. Relevant International Case Law

Recent international case law with respect to what constitutes a permissible assertion of extraterritorial jurisdiction is limited. In Barcelona Traction, the International Court of Justice did determine that, in the absence of treaty or agreement, the interests of another state and its sovereign rights within its territory must be respected.[11]

Other relevant international case law suggests that only the European Union and Germany have affirmatively applied the effects doctrine; and even they have limited its usage to the area of competition (i.e. antitrust) law.[12]

The seminal case in the European Union in this area is the Wood Pulp case, which involved an alleged price-fixing conspiracy by various wood pulp producers from Sweden, Finland, Canada and the United States.[13] The European Commission determined that the parties had engaged in price fixing in violation of EU competition laws set forth in Article 85 of the Treaty of Rome. The European Court of Justice (ECJ), in effect employing the "effects doctrine," affirmed this decision, pointing out that, although the price-fixing activity may have occurred outside the territory of the European Union, the defendants were, "taking part in concertation which has the object and effect of restricting competition within the common market within the meaning of Article 85 of the Treaty."[14]

This approach was subsequently affirmed in Gencor, where the ECJ found that the competition laws of the EU could apply to activity in South Africa because it was foreseeable that such activity would have an impact on the Community and application of EU laws would not conflict with the laws and regulations of South Africa.

F. Relevant International Agreements

As noted above, treaties and other international agreements are an important source of obligations under international law. In the modern era, there has been an expansion in the number of treaties and other agreements as countries have sought to find common ground on a variety of matters. Among the most important to emerge in recent years are the World Trade Organization (WTO) Agreements. The WTO was established on January 1, 1995. The WTO is both a set of agreed international trading rules and an organization that oversees those rules. The current set of WTO rules was the outcome of the Uruguay Round negotiations concluded in 1994 and include the original provisions of the General Agreement on Tariffs and Trade (GATT). Given the extensive body of international economic law contained in these agreements, a review of these agreements to ascertain their potential applicability to NHTSA regulations under the TREAD Act may well be warranted.

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[11] *See* Barcelona Traction, Light and Power Co. (Belg. V. Spain), 1970 I.C.J. 3, 17-53 (Feb. 5)
[12] James J. Friedberg, The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine, 52 U. Pitt. L. Rev. 289, 316 n. 188.
[13] *In re* Wood Pulp Cartel v. E.C. Comm'n, [1988] 4 Common Mkt. L.R. 901.
[14] Id., para. 13.

G. Attitudes of Other Countries to Extraterritoriality

In general, most countries are highly suspicious of another country's assertion extraterritorial jurisdiction because of the potential conflict with other countries' sovereignty. While the European Commission does exercise extraterritorial jurisdiction in narrow circumstances under EU competition law, the Commission also takes the position that it must base such action on more than just intent and effect within the EU and therefore requires that other factors also be considered, such as a possible conflict of law and comity.

More generally, the EU has resisted expansionist efforts of the United States to assert extraterritorial jurisdiction. In a heated controversy in the early 1980's over U.S. attempts to apply its laws to restrict the construction of a gas pipeline from the USSR to Western Europe, the United States was in effect forced to back down in the face of vigorous objections from its Western European allies about interference with their sovereignty. Indeed, at least one EU country enacted "blocking" legislation to thwart such jurisdiction by the United States.[15] Since then, a number of European and other countries have become increasingly assertive in their opposition to U.S. attempts to prescribe rules regarding activities outside the United States and have become increasingly willing to adopt similar retaliatory statues designed to blunt the effect of U.S. law. Such actions demonstrate European antipathy to an expansive interpretation by the United States of what is a permissible assertion of extraterritorial jurisdiction. Many other countries share the European view in this regard.

III. Domestic Legal Constraints on the Extraterritorial Application of NHTSA Regulations

In addition to the possible international legal constraints on the extraterritorial application of NHTSA regulations under the TREAD Act, there are also domestic legal constraints to such application.

A. Status of International Law as Domestic Law of the United States

The Supreme Court long ago determined that international law is a part of U.S. law.[16] The Supreme Court has also stated that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." [17] In other words, any law of the United States is to be interpreted in such a way as not to violate international law absent a clear indication of Congressional intent to do so.

B. Standards under U.S. Law Governing Extraterritorial Application of U.S. Statutes and Regulations

There would appear to be potential U.S. constitutional limits on the extent to which the U.S. government can require conduct outside the United States without running afoul of the constitutional requirement that there be no deprivation of liberty or property without due process of law. In this regard, the Supreme Court has determined that the due process clause of the 14th amendment limits the

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[15] Friedberg, *supra,* note 2, at 291. [Footnote 5 describes examples of blocking statutes: "The British Protection of Trading Interests Act of 1980, for example, contains a "claw back" provision which creates a cause of action in English courts for recovery of the punitive portion of a foreign damage judgment in certain circumstances, notably when the non-British judgment concerns activity outside the enforcing nation's territory (e.g. extraterritorial jurisdiction). Protection of the Trading Interests Act, 1980, Ch. 11."].

[16] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)

[17] Whitney v. Robertson, 124 U.S. 190 (1888)

jurisdiction of a state with respect to transactions that have little or no contact with that state.[18] It is to be assumed that similar due process limitations apply to the U.S. government in an international context under the 5th amendment.

As previously noted, a state has the jurisdiction to prescribe law with respect to, among other things, conduct outside its territory that has or is intended to have substantial effect within its territory. However, the exercise of such jurisdiction must not be unreasonable. What constitutes an "unreasonable" exercise of jurisdiction to prescribe can depend on a variety of factors, which have been previously enumerated.

U.S. courts have generally subscribed to this basic doctrine of reasonableness with respect to the application of U.S. laws to persons or activities outside the United States. In particular, U.S. courts have determined that, where U.S. regulation of transnational companies in their activities outside the United States is based on the effects such activities have in the United States, the principle of reasonableness calls for limiting the exercise of U.S. jurisdiction so as to minimize conflict with the jurisdiction of the state where the activity takes place. U.S courts have also followed the notion set forth in section 114 of the Restatement that, "where fairly possible, a U.S. statute is to be construed so as not to conflict with international law or with an international agreement of the United States."[19]

C. Relevant U.S. Case Law

Presumption Against Extraterritorial Application of U.S. Statutes

The Supreme Court has long applied a judicial presumption against the extraterritorial application of U.S. statutes absent an expression of specific Congressional intent. This presumption was first articulated in American Banana,[20] and has been affirmed in a subsequent line of cases, including Arabian American Oil,[21] Smith v. United States,[22] and Haitian Centers Council.[23]

Overcoming the Presumption – The Effects Doctrine

Although the judicial presumption against extraterritoriality (absent expression of a specific Congressional intent) continues to have applicability, U.S. courts have carved out an important exception in a line of cases involving extraterritorial application of the Sherman Act (antitrust) and the Lanham Act (trademarks).[24] The facts in this line of cases all involved circumstances in which conduct or activities occurring outside the United States had effects on commerce in the United States. The decisions in these cases have given rise to the so-called "effects doctrine" under U.S. law, which parallels and is the source of the effects doctrine under international law. Under this doctrine, U.S. statutes will be interpreted to

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[18] See Home Ins. Co. v Dick, 281 U.S. 397 (1930); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)
[19] Id., Sec. 114
[20] American Banana Co. v. United States, 213 U.S. 347, 356-357, 53 L.Ed. 826, 29 S. Ct. 511 (1909).
[21] E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 111 S.Ct. 1227 (1991).
[22] Smith v. United States, 507 U.S. 197 (1993).
[23] Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993).
[24] With respect to the Lanham Act *see* Steele v. Bulova Watch Co., 344 U.S. 280 (1952). [Found that the Lanham Act regarding trademarks applied to U.S. citizen who affixed the name Bulova to watches assembled in Mexico and sold them to American tourists. These tourists subsequently brought them back to the United States. The Court found that Congress intended that the Act apply extraterritorially and that the conduct had effect in the United States].

apply to conduct or activities outside the United States (even in the absence of an expression of Congressional intent) where the conduct or activities result in substantial effects within the United States. The most significant of these cases was Alcoa[25], which was recently affirmed in Hartford Fire Insurance.[26]

Recent Lower Court Decisions Involving Extraterritoriality

Within this general framework of judicial precedent discussed above, lower courts in the post-Alcoa era have taken additional varying approaches to the issue of the extraterritorial applicability of U.S. law. Some have built upon the "effects doctrine." Others have looked to different factors altogether when seeking to balance the jurisdiction to prescribe with the requirement that such jurisdiction be applied reasonably. These cases include Timberlane,[27]
NRDC v. NRC,[28] and Massey[29].

This line of lower court cases suggests that, while the Supreme Court has adopted a broad judicial framework within which to judge whether the extraterritorial application of U.S. statutes and regulations is lawful, there remains considerable room for U.S. courts to interpret whether the extraterritorial application of a particular law or regulation is permissible under U.S. law. In this regard, the factors set forth by the Restatement as to what constitutes a reasonable application of the jurisdiction to prescribe and enforce law outside U.S. territory are likely to continue to be considered by U.S. courts in future litigation.

Jurisdiction of U.S. Courts over Foreign Persons

A corollary issue to the extraterritorial application of U.S. law concerns the assertion by U.S. courts of jurisdiction over foreign persons.

It is settled doctrine under U.S. law that, in order for a U.S. court to assert jurisdiction over a nonresident in a manner that is consistent with notions of Due Process, the nonresident must have established "minimum contacts" with the forum state.[30] Minimum contacts have been established when the defendant has "purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of the forum state."[31] The test of Due Process is met if the defendant had enough contacts with the forum state that he "should reasonably expect to be haled into court there."[32]

The issue that typically arises when the conduct in question occurs outside of the boundaries of the United States is what constitutes "minimum contacts" with the United States. More precisely, in an international context, did the defendant carry on the activity at issue outside the United States in a manner such that the activity had a substantial, direct and foreseeable effect within the United States?[33] The

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[25] United States v. Aluminum Co. of America (ALCOA), 148 f. 2d 416,443 (2d Cir., 1945)
[26] Hartford Fire Insurance Company v. California, 509 U.S. 764, 796
[27] Timberlane Lumber Co. v. Bank of America National Trust and Savings Association, 549 F2d 597, at 613, (9th Cir. 1976).
[28] NRDC v. The Nuclear Regulatory Commission, 647 F2d 1345, at 1356 (D.C. Cir. 1981)
[29] Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir.1993)
[30] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
[31] Hanson v. Denckla, 357 U.S. 235, 253 (1958).
[32] World Wide Volkswagen Corp. v. Woodson, 444.u.s. 286,295 (1980)
[33] RESTATEMENT 3RD, at §421(2)(j).

governing case with respect to this question is Asahi Metal.[34] This case established that mere foreseeability by the defendant that the stream of commerce would eventually bring a product to the United States is not sufficient for a court to assert jurisdiction; a more affirmative act by the defendant is required to establish sufficient contact with the United States.

U.S. courts have also generally subscribed to Section 431 of the Restatement with respect to U.S. jurisdiction to enforce U.S. laws outside U.S. borders. According to Section 431, a state may employ judicial or nonjudicial measures to induce or compel compliance or punish non-compliance provided it has jurisdiction to prescribe in accordance with the principles of international law outlined above. Enforcement measures must be reasonably related to the laws or regulations to which they are directed; there has been an appropriate determination of a violation; and the measures must be proportional to the offense. Moreover, a state may employ enforcement measures against a person located outside its territory if the person is given reasonable notice and an opportunity to be heard.

IV. Possible Legal Challenges to Extraterritorial Application of NHTSA Regulations

Depending on their final content, it is possible that NHTSA regulations could be legally challenged by another country under international law or by a private party adversely affected by the regulations under U.S. law. In the final analysis, whether such legal challenges would be brought would probably turn largely (but not necessarily exclusively) on the issue of whether the regulations were considered to be reasonable.

Under International Law

The TREAD Act was clearly written by Congress to apply to persons and activities outside the United States and is therefore a clear assertion of extraterritorial jurisdiction by the United States. Given the sensitivity of other countries to the extraterritorial application of U.S. law by the United States, there is always the potential that another country might challenge the NHTSA regulations as a violation of international law, particularly if such country believed that the regulations were overly burdensome and unreasonable.

NHTSA should be aware of this possibility as it carries out its rule-making process. As international case law and experience indicate, the international community takes, at best, a very skeptical view regarding the exercise of jurisdiction to prescribe with respect to activity taking place outside the territory of the country concerned. If the NHTSA regulations to implement the TREAD Act were ever to be challenged by another country under international law, the potential legal bases for such a challenge might include an assertion that the regulations had overreached and were unreasonable; that the foreign activities covered by the regulations did not have substantial, direct and foreseeable effects in the United States; that the entities subject to the regulations did not have sufficient contacts with the United States; or that the regulations conflicted with the law of another country. In addition to reviewing these legal bases, it is possible that an international tribunal would also consider additional factors in determining the consistency of the regulations with international law. These factors might include, for example, the foreign government's interest in also regulating such activity, and whether the U.S. civil and criminal penalties associated with the regulations are proportional to the activity being regulated.

[34] Asahi Metal Industry Co. V. Superior Court of California, 480 U.S. 102

Under U.S. Law

While it is clear that the U.S. Congress intended for the TREAD Act to have extraterritorial application, there is no clear indication in the act that the Congress wanted the act to be interpreted in any way that would violate international law. Accordingly, as a matter of U.S. law based on the legal standards and judicial precedents discussed previously, whether a successful challenge against NHTSA regulations implementing the act could be brought in U.S. courts will again depend to a significant extent on the perceived reasonableness of the regulations.

Criminal Penalties

The TREAD Act sets forth certain criminal penalties with respect to the reporting requirements set forth in the act and to be prescribed in regulation by NHTSA. Although there is a requirement that there be a specific intention of misleading the Secretary of Transportation with respect to defects that have caused death or serious bodily injury to an individual, the fact that these criminal penalties apply potentially to overseas persons in relation to overseas activities may be of concern to some foreign countries. Whether a legal challenge would ever be brought under either international against the criminal penalties associated with NHTSA regulations could again well be dependent on the reasonableness of the NHTSA regulations. If the scope of the NHTSA regulations is extremely broad, thereby increasing the scope of foreign activity that might be subject to criminal penalties, this could increase the possibility of a legal challenge.

V. Minimizing Potential Conflict with International and Domestic Law: Ensuring that NHTSA Regulations Are Reasonable

The TREAD Act contains a number of requirements regarding the reporting of defects in motor vehicles and equipment in foreign countries and the reporting of information from both foreign and domestic sources that might assist in the identification of defects related to motor vehicle safety in motor vehicles and motor vehicle equipment in the United States. These requirements set forth a number of terms that are open to interpretation and regulation by NHTSA. How NHTSA regulates under the act will determine to a great extent the extraterritorial impact of the act and whether challenges might be brought under international or domestic law against the NHTSA regulations. NHTSA's objective should therefore be to ensure that its regulations under the TREAD Act are reasonable and could be defended as such under both international and domestic law.

In deciding how draft its regulations, NHTSA would be well advised to seek and to review carefully the input of foreign entities and foreign governments with respect to what information from overseas persons regarding overseas activities should be required under these regulations. By pursuing a cooperative approach with these foreign interests, NHTSA can go a long way to minimizing any potential future legal challenges to its actions on jurisdictional grounds. NHTSA should also consult with the State Department, USTR, and other appropriate U.S. government agencies who manage the foreign economic relations of the United States to obtain their views on the potential for conflict with other countries due to the proposed regulations.

NHTSA should also pay careful attention to the factors set forth in the Restatement that are usually considered in determining whether the extraterritorial assertion of jurisdiction is reasonable in the circumstances. In this regard, NHTSA should consider in particular whether the information it is seeking relates to an activity overseas that could have a direct, foreseeable and substantial effect within the United States; the extent to which the activity in question is regulated by a foreign government.

In order to illustrate the balance that NHTSA will have to strike in implementing the TREAD Act in order to minimize potential conflict with international and domestic law regarding the extraterritorial application of its regulations, we suggest, for example, that the rule could reasonably require reports from foreign companies manufacturing vehicles for sale in the United States, as long as the required reports relate to issues that could arise in those vehicles, but it would be unreasonable to require reports from a foreign company that manufactures vehicles solely for sale in foreign markets, and has no nexus to the United States.

Other key issues for which NHTSA will have to provide thoughtful and reasoned guidance that will affect the extent to which the regulations have an extraterritorial impact include:

- Countries and manufacturers covered – Should the final rule be limited only those manufacturing entities that produce for export to the U.S. and to the countries in which they produce? Or should the rule cover all countries to which manufacturers who sell to the United States also sell?

- "Identical or substantially similar" – How narrowly or broadly should the scope of this expression be? The more narrowly defined is this term, the more reasonable is the assertion of extraterritorial jurisdiction likely to be found.

- "information which is received by the manufacturer derived from foreign...sources... that may assist in the identification of defects related to...motor vehicle safety in motor vehicles...in the United States" – How narrowly or broadly should the scope of this expression be construed. The more narrowly construed is this expression, the more reasonable is the assertion of extraterritorial jurisdiction likely to be found. The more broadly construed, the more unreasonable is the assertion of extraterritorial jurisdiction likely to be found.

VI. Conclusion

How NHTSA drafts its regulations to implement the TREAD Act raises important questions under international and domestic law in relation to the proper exercise of extraterritorial jurisdiction by the United States. Although the clear intent of Congress was to assert extraterritorial jurisdiction under the act, such intent and the fact NTHSA was given broad authority to implement the act do not mean that NHTSA has total and unfettered discretion with respect to how it proceeds in the rule-making process. Unless NHTSA proceeds cautiously and in a cooperative manner with foreign entities and foreign governments likely to be affected by the act, NHTSA faces the risk of being challenged both under international and domestic law on the grounds of asserting extraterritorial jurisdiction in an impermissible manner. This is a risk that can be minimized if the agency properly understands the limitations placed on it by both international and domestic law with respect to extraterritorial regulation and proceeds with due consideration of these limitations.